(30,435)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 470

MIDLAND LAND AND IMPROVEMENT COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 30, 1924

[fol. 1] **IN THE COURT OF CLAIMS**

No. 33713

MIDLAND LAND AND IMPROVEMENT COMPANY, a Corporation,

vs.

THE UNITED STATES

I. PETITION—Filed Feb. 6, 1917

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioner, the Midland Land and Improvement Company, respectfully represents and shows as follows:

It is now, and at all times hereinafter mentioned and referred to, was, a corporation, organized under the laws of the State of New Jersey, with its principal office for the transaction of business located at the City of New York, in the State of New York; it is the sole owner of the claim herein set forth, no part thereof having been assigned to any other person or corporation; and this suit is brought in its own behalf.

On June 29, 1907, an advertisement was issued and published by Colonel D. W. Lockwood, Corps of Engineers, for and in behalf of the United States of America, under the provisions of the River and Harbor Act, approved March 2, 1907 (34 Stat., 1073, 1079), soliciting and inviting proposals until July 30, 1907, for certain dredging in Newark Bay and Passaic River, New Jersey, under the direction of the Army Engineers.

[fol. 2] At the same time printed reports, surveys, maps, estimates, drawings and specifications for the proposed work were issued by the Secretary of War for distribution among, and for the information, guidance and direction of, bidders, and were by his order made the basis on which bidders should make their estimates and submit their proposals for executing the said work.

Thereafter, claimant made careful examination of the said reports, surveys, maps, drawings and specifications, and, as far as possible, examined the conditions obtaining along the line of the proposed work, satisfied itself as to the kind and quality of the materials to be excavated, the method to be adopted, and the plant required therefor, and, generally, familiarized itself with all conditions relating thereto, so far as the same could be anticipated, ascertained, learned and understood from such information so obtained; and, relying upon the said printed reports, surveys, maps, estimates, drawings and specifications and information so obtained, did on the 30th day of July, 1907, file a sealed proposal for doing the dredging contemplated and specified therein, at the rate of sixteen and one-quarter cents (16¼c.) per cubic yard, scow measurement, in accordance with paragraph 28 of the specifications referred to, which proposal was by the defendants thereafter duly accepted in writing.

On August 12, 1907, pursuant to the acceptance of said proposal by the Government, a contract in writing was entered into by and between the claimant and defendants, whereby the claimant undertook and agreed, under penalty of bond as required by the contract, to furnish the necessary labor and plant and to dredge, excavate, remove and dispose of the materials contemplated, specified and de- [fol. 3] scribed in the said advertisement, proposal, specifications, reports, drawings, surveys, maps and estimates; and the defendants therein agreed to pay for all such material so specified, when satisfactorily dredged, removed and disposed of under the said contract, at the rate of sixteen and one-quarter cents (16¼c.) per cubic yard, scow measurement.

By the terms of the contract it is provided:

"The required rate of work will be at least 50,000 cubic yards per month."

A copy of the said contract, with the attached advertisement, proposal and specifications, is herewith filed and marked "Exhibit A"; and claimant prays that the same may form and be treated as a part of this petition.

On or before August 28, 1907, the claimant was duly notified, in writing, by Chief of Engineers of the United States Army of the approval by him of the said contract, and on the last-named date the claimant began work thereunder, and, thereafter, prosecuted the said work with faithfulness and energy, in strict accordance with the requirements of the said contract and specifications, and from August 28, 1907, up to August 3, 1911, dredged, excavated, removed and disposed of the material involved at a rate largely in excess of 50,000 cubic yards a month, as directed by, and to the entire satisfaction of, the Government Engineer in charge of the work.

On August 3, 1911, a new or supplemental agreement, made pursuant to the Act of Congress, approved February 27, 1911 (38 Stat., 933, 936), setting forth in express terms that it was found advantageous and in the best interests of the United States to modify the aforesaid agreement of August 28, 1907, was made and entered into [fol. 4] by and between the claimant and the defendants, whereby the claimant undertook to do the additional dredging required to widen the channel in the Passaic River on the south side of the line of work then being done under the contract of August 28, 1907, in the vicinity of Listers Chemical Works, and at other bends in the river, below the Montclair and Greenwood Lake Railroad bridge, the additional dredging likewise to be paid for at the rate of sixteen and one-quarter cents (16¼c.) per cubic yard, scow measurement.

A copy of the said contract is herewith filed and marked "Exhibit B"; and the claimant prays that the same may form and be treated as a part of this petition.

Between August 28, 1907, and October 1, 1912, the claimant operating, first, under the contract of August 28, 1907, and, later, under it and the contract of August 3, 1911, dredged, excavated, and

removed from the lines of said work and disposed of, in accordance with the specifications, and as prescribed by the Government Engineer in charge, a large quantity of material, to-wit, 3,153,633 cubic yards which was all the material of the kind specified in the said contract that the claimant was permitted by the Engineer in charge for the government to remove from the line of the said work, all of which work was performed at a rate in excess of 50,000 cubic yards a month and was duly accepted by the Engineer in charge for the government.

For the work so done in removing the said amount of material, the claimant became entitled under the said contracts at the rate of sixteen and one-quarter cents (16¼c.) per cubic yard to the sum of Five hundred and twelve thousand four hundred and sixty-five dollars and twenty cents ($512,465.20), of which there has been [fol. 5] paid by the defendants unto the claimant the sum of Four hundred and seventy-eight thousand four hundred and sixty-seven dollars and five cents ($478,467.05), leaving a balance due amounting to Thirty-three thousand nine hundred and ninety-eight dollars and fifteen cents ($33,998.15), for which claimant asks judgment.

C. C. Calhoun, Attorney for Claimant. Dan'l B. Henderson, of Counsel.

Jurat showing the foregoing was duly sworn to by Charles F. Wood omitted in printing.

[fol. 6] "Exhibit A" to Petition

Form 19A

1. This agreement entered into this 12th day of August, nineteen hundred and seven, between Colonel D. W. Lockwood, Corps of Engineers, United States Army, of the first part, and Midland Land & Improvement Company, of New York, in the County of New York, State of New York, of the second part, witnesseth that in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Colonel D. W. Lockwood, Corps of Engineers, for and in behalf of the United States of America, and the said Midland Land & Improvement Company, do covenant and agree to and with each other, as follows:

That the said party of the second part shall furnish the necessary labor and plant, and dredge about four million one hundred and seventy-seven thousand one hundred and ten (4,177,110) cubic yards of material, scow measurement, in Newark Bay and Passaic River, N. J.; and that the said party of the second part shall be paid therefor at the rate of sixteen and one-quarter (16¼) cents per cubic yard, scow measurement, amounting to about $678,780.38, for all material which shall have been satisfactorily removed and disposed of.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

[fol. 7] 3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraphs 14 and 21 of the attached specifications.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money and reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the [fol. 8] first part may deduct all the above-mentioned sums out of or from the money or reserved percentage as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time limit originally set for completion shall be determined by the said party

of the first part and deducted from any payments due or to become due the party of the second part:

Provided, however, that the party of the first part may with the prior sanction of the Chief of Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforseeable cause or delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work [fol. 9] or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

6. If, at any time during the completion of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both labor and material thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having first been agreed upon by the contracting parties and approved by the Chief of Engineers.

[fol. 10] 8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand,

or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraphs 16 and 28 of the specifications hereto attached and forming part of this agreement.

12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by said Midland Land & Improvement Company are reserved to the United States.

13. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, [fol. 11] is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

But this stipulation, so far as it relates to Members of, or Delegates to, Congress, is not to be construed to extend to this contract.

14. This contract shall be subject to the approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witness: H. Pedlar, as to W. D. Lockwood, Colonel, Corps of Engineers. (Seal.) Witness: Chas. T. Ellis, Secy., as to Midland Land & Improvement Co., by Wilbur G. Fisk, Pres.

(Executed in triplicate.)

Approved August 27, 1907. A. Mackenzie, Brig. Gen., Chief of Engineers, U. S. Army.

[fol. 12] Improvement Channel in Newark Bay and Passaic River, N. J.

Advertisement

U. S. Engineer Office,

Room C 8, Army Building, 39 Whitehall Street

New York City, June 29, 1907.

Sealed proposals for dredging in Newark Bay and Passaic River, N. J., will be received at this office until 12 M., July 30, 1907, and then publicly opened. Information furnished on application.

D. W. Lockwood, Colonel, Corps of Engineers.

General Specifications

1. No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed. At the option of bidders certified checks for the amount of the guaranty required may be furnished in place of the guaranty.

2. All bids and guaranties must be made in duplicate upon printed forms to be obtained at this office.

3. Each guarantor will justify in the sum of Eighty thousand dollars ($80,000). The liability of the guarantors and bidder is determined by the Act of March 3, 1883, 22 Statutes, 487, Chap. 120, and is expressed in the guaranty attached to the bid.

[fol. 13] 4. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of One hundred thousand dollars ($100,000) within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

5. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for dredging in Newark Bay and Passaic River, N. J.," to be opened July 30, 1907, and inclosed in another sealed envelope addressed to Colonel D. W. Lockwood, Corps of Engineers, Army Building, New York, but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

6. Whenever the term "Engineer" is used in the specifications it is understood to refer to the officer of the Corps of Engineers, U. S. Army, in charge of the work. He will be represented on the work by as many assistants as may be necessary. Whenever the term "contractor" is used it is understood to refer to the second party to the contract. Subcontractors, as such, will not be recognized.

7. It is understood and agreed that the quantities given in these specifications are approximate only, and that no claim shall be made [fol. 14] against the United States on account of any excess or deficiency, absolute or relative, in the same. No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.

8. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

9. It is understood and agreed that the contractor assumes full responsibility for the safety of his employees, plant, and materials,

and for any damage or injury done by or to them from any source or cause.

10. In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction is prohibited.

11. The contractor will be required to discharge any employee who, in the opinion of the Engineer, is objectionable or incompetent. Such discharge shall not be made the basis of any claim for compensation or damages against the United States or any of its officers or agents.

12. The contractor must at all times either be personally present upon the work or be represented thereon by a responsible agent, who shall be clothed with full authority to act for him in all cases and to carry out any instructions relative to the work which may be given by the Engineer, either personally or through an authorized representative.

13. No work shall be done on Sundays or legal national holidays except in cases of emergency, and then only with the consent of the [fol. 15] Engineer; nor shall any work be done at night unless authorized in writing by the Engineer.

14. The contractor will be required to commence work under the contract within Thirty (30) days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, unless otherwise authorized by the Engineer, to prosecute the said work with faithfulness and energy, in accordance with paragraph 21.

15. The time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience, unless extraordinary and unforeseeable conditions supervene.

16. Payments for accepted work will be made monthly for material excavated and deposited, and not previously paid for, subject to the condition that no payment, except the final one, will be made for the excavation and deposit of a quantity less than 50,000 cubic yards, scow measurement, unless in the opinion of the Engineer the work has been unavoidably delayed by bad weather, or unless a less quantity has been required by the Engineer in charge to be removed during the calendar month next preceding the month of payment. A percentage of ten (10) per centum will be reserved from each payment until half the work under the contract, as estimated by the Engineer, has been completed, after which there shall be no further reservation. The reserved percentage will be paid upon the satisfactory completion and final acceptance of work under the contract:

Provided, That should payments be discontinued for a period of [fol. 16] one year, owing to lack of funds, the total amount retained from previous payments shall be paid the contractor.

17. The price bid shall be full compensation for furnishing all necessary labor, materials and appliances of every description, and for doing all the work herein specified to the satisfaction of the Engineer, and shall include all risks and delays of whatever nature attending the execution of the work.

Special Conditions

18. The River and Harbor Act, approved March 2, 1907, contains the following provisions:

Improving channel in Newark Bay and Passaic River, New Jersey, in accordance with the report submitted in House Document Numbered Four hundred and forty-one, Fifty-ninth Congress, second session, Two hundred thousand dollars: Provided, That the Secretary of War may enter into a contract or contracts for such materials and work as may be necessary for the prosecution of said work, to an amount not exceeding in the aggregate Six hundred and fifty thousand dollars, to be appropriated for, from time to time, according to law, in addition to the amounts herein and heretofore appropriated.

It is expected that Congress will, in accordance with the provision of the act quoted in the preceding paragraph, make appropriations at such times as to permit work to be done in each period of twelve months during the continuance of the contract. But the contractor must take his own risk in this, and it is distinctly understood and agreed that the United States is in no case to be made liable for [fol. 17] damages in connection with this contract on account of delay in payments on same due to a lack of available funds.

The amount now available for payments for dredging under the contract, including cost of administration and superintendence, is about Two hundred thousand dollars ($200,000).

Should available funds become exhausted during the progress of the work, the contractor will be duly notified, and he is given the option of continuing the work as rapidly as possible under the law and contract, relying upon future appropriations for payment, or of suspending op-rations until such appropriations are actually made and available. But the contractor must promptly notify the Engineer which method he will adopt, so that sufficient funds may be reserved from appropriations on hand to cover contingencies and superintendence, should he elect to continue the work in advance of appropriations. In case work is suspended while awaiting appropriations by Congress, the contractor shall resume work within thirty (30) days after notification that funds are again available for payments for work under the contract.

I. Description of Work

19. (a) The work to be done under these specifications consists in dredging a channel as above authorized 16 feet in depth at mean low water through Newark Bay and Passaic River from Staten Island Sound to the Montclair and Greenwood Lake Railroad bridge, a distance of 10.8 miles. The width of this channel to be 300 feet to the Nairn Linoleum Works, a distance of 9.7 miles; thence 200 feet in width 1.1 miles, to the Montclair and Greenwood Lake Railroad Bridge.

[fol. 18] (b) Depth, Side Slopes, and Tides:—Under the pro-ect of June 13, 1902, a channel is in progress 200 feet wide throughout the reach to be improved. This channel is to be 12 feet deep to the Nairn Linoleum Works and 10 feet deep above that point, and of the 10.8 miles to be dredged, about 8 miles from Newark Bay up have been completed; and the entire channel will be completed under certain contracts now in force and in progress. There are no natural depths in the river in excess of those to be dredged under the project of 1902. The minimum depths in the river on either side of this channel are from 6 to 8 feet up to the vicinity of the Nairn L-noleum Works and about 4 feet above that locality.

The depth required is sixteen (16) feet at mean low water; an allowance of one (1) foot for overdepth in dredging will be made.

Natural side slopes due to falling in of the banks of excavation during dredging, up to and not exceeding slopes of 1 or 2, will be allowed. In estimating for deductions for dredging beyond limits and for overdepths the ratio between scow and prism measurement will be the same as stated in paragraph 28. The mean range of tides is about 4¾ feet.

(c) Character of material.—The material to be excavated is believed to be mud, sand and gravel, but bidders are expected to examine the work and decide for themselves as to its character and make their bids accordingly, as the United States will not guarantee the accuracy of this description. The price bid per cubic yard will cover the removal of all material encountered, except ledge rock.

[fol. 19] (d) Amount of Dredging.—The quantity of material to be removed under the contract will depend upon the price bid.

II. Conduct of the Work

20. Order of Work.—The location and order of work will be determined by the Engineer, and the dredging shall be done as prescribed by him. The general order of the work will be to divide it into sections 150 feet in width, beginning at the lower end in Newark Bay, and proceeding as may be directed. After it is reported as finished, a careful examination of the bottom will be made under the direction of the Engineer, and before final acceptance the contractor shall remove any lumps or ridges that have been left during the work. It — is found that any material has been dredged from any point below or outside the limits given for work, unless authorized

by the Engineer, the amount of such material shall be deducted from the total amount dredged before final acceptance of the work.

21. Rate of Work and Time for Completion.—Work must be commenced and prosecuted as provided in paragraph 14. No work will be required in the months of December, January and February, but it may be continued in these months if the contractor so desires. The required rate of work will be at least 50,000 cubic yards per month, unless otherwise authorized by the Engineer. If at any time after the date fixed for beginning the work it shall be found that operations are not being carried on as rapidly as required by the contract, the Engineer shall have power, after due notice in writing to the contractor, to employ such additional plant or labor, or to [fol. 20] purchase such material as may be necessary to insure the proper completion of the work within the time specified, and the excess cost thereof over what the work would have cost at the contract rate shall be a charge against any sums due or to become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract.

22. Disposal of Material.—The contractor will provide his own dumping ground, subject to the approval of the Engineer, and expenses incurred to this end will be paid by the contractor, without reimbursement by the Government. The material excavated must be disposed of in accordance with law; any material deposited elsewhere than in designated or approved places will not be paid for, and the contractor may be required to redredge such material and deposit where directed. All scows must be kept in good condition, the coamings kept repaired, and the pockets provided with proper doors or appliances, so that no leakage of material may occur during transit from the dredges to the dumping grounds.

23. Liability of Contractor.—The contractor will be held responsible that his employees strictly observe the laws of the United States, especially as to the throwing or dumping any material into the navigable waters of the United States other than as designated, or obstructing navigation other than as authorized. He will be expected to comply with the laws of the United States and the States as to the inspection of boilers, hulls, etc., and the licensing of masters, engineers, etc. He shall conform to such sanitary requirements as may be prescribed by the Engineer.

[fol. 21] 24. Navigation and Responsibility for Damages.—The contractor will be responsible for keeping lights, in accordance with law, on all of his plant, and shall maintain and operate it in the channel in such a way as to interfere as little as possible with navigation, but under no circumstances shall the United States be held responsible for any accident or in-ury to the contractor's employees, plant, or materials, passing vessels, or to any person or property whatever, nor for any damage done by or to them, or any of them, from any source or cause during the progress of the work, and by reason of it. When required by the Engineer, the contractor shall remove his plant to one side of the channel at night, also buoys, piles, and other articles placed in the waterway, and shall leave the

channel in good order, clear and fit for navigation. The United States shall not be responsible for delays to the contractor incidental to the operation or passage through bridges, or for the removal or relaying of cables or pipe lines crossing the river.

III. Plant

25. The excavation and disposal of material may be done by any method and with any kind of plant capable of doing the work satisfactorily, but it must be such as, in the opinion of the Engineer, is sufficient. In the case of the accepted bidder, the statement of plant will constitute a part of the contract, and any disadvantageous alteration in the working plant, made without the knowledge and consent of the Engineer will be considered a violation thereof. (See paragraph 29.)

[fol. 22]

IV. Supervision

26. Operations will be carried on under the immediate supervision of Inspectors to be appointed by the Engineer, and their orders and instructions shall be obeyed by the contractor and his employees. The Assistant Engineer or Inspector will establish ranges, tide gauges, and the datum to which the channel depths are referred. Any differences arising between the Inspector and contractor will be referred to the Engineer, except as otherwise specifically provided in paragraph 28, whose decision in the matter will be final. The contractor must furnish suitable range stakes for marking the cuts, and painted tide gauges, and must place and maintain them under the Inspector's supervision. He must furnish the Inspectors with suitable boats, sounding poles, and all necessary assistance for setting range stakes and taking soundings, and transport the Inspectors from the dredge to the shore and back whenever required to do so, in safe and suitable boats, furnishing a tug or power boat in localities especially exposed to danger from strong tides or passing vessels. He must also furnish the Inspectors, if required by the Engineer, with suitable room on the plant for office purposes, and meals served on board the plant during working hours. The cost of these several requirements must be included in the price for work under these specifications.

27. Sweeping, Sounding, and Removal of Shoals and Obstructions.—At such times as may be directed by the Engineer, a careful sweeping or sounding of the bottom dredged over shall be made. The contractor, if required, will furnish for such sweeping an adjustable, horizontal sweep rod, satisfactory to the Engineer, and [fol. 23] maintain and operate it under the direction of the Assistant Engineer or Inspector, the cost of such sweeping or sounding to be included in the price bid. The contractor shall remove any lumps, or ridges, except rock, that may have been left during the work.

V. Measurement and Payment

28. (a) The material removed will be measured by the cubic yard, either in scows, if placed in such, or in the cut prism, five (5) cubic yards of prism measurement to be considered equivalent to six (6) cubic yards measured in scows. In case of scow measurement the Assistant Engineer and Inspector or Suveyor will measure each scow before it is employed upon the work, and whenever they think it desirable during the progress of the work and determine its capacity. In order to facilitate the accurate estimation of the material excavated, the contractor will furnish every facility for the measurement of the dimensions of the scows to be used, and no claim will be made for any delay incident to these measurements. The Inspector's judgment as to whether any scow is full or to what extent it is short shall be accepted as final. Unless otherwise authorized by the Engineer, each pocket must be loaded to a practically level plane, either to the top or bottom of the coamings or other intermediate or lower plane approved by the Engineer, and no payment will be made for pockets loaded otherwise. Before beginning work, the contractor will see that the number of each scow and its capacity in cubic yards, as determined by the Assistant Engineer or Inspector, are conspicuously painted upon it; these figures shall be changed whenever required by the Engineer. In case of prism measurement, [fol. 24] the Assistant Engineer or Inspector will take accurate soundings before the commencement and after the completion of the work, and from these will determine the amounts removed. At localities where scour would make this method impracticable, the quantity removed by the contractor will be determined in such manner as the Engineer may direct. Approximate estimates for intermediate payments will be made from time to time, as accurate as may be.

(b) Payments will be made as provided in paragraph 16, and they will be based upon the Assistant Engineer's or Inspector's estimates of the amount of material removed and deposited, after making any deductions provided for under paragraphs 20, 21 and 22. No payment will be made for any work under the contract unless it is done in exact accordance with these specifications, and with the orders and instructions concerning it, which may be given by the Engineer, or by the local Engineer or Inspector who is authorized to act for him.

VI. Proposals

29. Stipulations.—Bidders will state in the proposal a price per cubic yard, scow measurement, for dredging and removal of material. Bidders shall also state the kind, capacity, number, condition, and location of dredges, scows, tugs, and other appliances it is proposed to use, and provide facilities for inspecting same. (See paragraph 25). All expenses of every description which the contractor may find it necessary to incur in the protection of the work, as required by these specifications, and by the orders and instructions which

may be given concerning it, should be provided for in the price bid, as no extra allowance or payments of any kind will be made except [fol. 25] as provided for in the form of contract to be entered into.

30. Explanations and Corrections.—Any doubt as to the meaning of these specifications, and any obscurity in the wording of them, will be explained by the Engineer, who shall have the right to correct any errors or omissions in them when such correction is necessary for the proper fulfillment of their intention.

[fol. 26] Proposal for Dredging in Newark Bay and Passaic River, N. J.

62 Cedar Street,
New York City, July 30th, 1907.

To Colonel D. W. Lockwood, Corps of Engineers, U. S. Army, Army Building, New York, N. Y.

SIR: In accordance with your advertisement of June 29, 1907, inviting Proposals for dredging in Newark Bay and Passaic River, N. J., and subject to all the conditions and requirements thereof, and of your specifications dated June 29, 1907, copies of both of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we (or) I propose to do the required dredging at the rate of sixteen and quarter cents (16¼ cts.) per cubic yard, based on scow measurement, in accordance with paragraph 28 of these specifications.

Bidders will here state the information called for in paragraph 29.

It is proposed to use in the above-named work seven (7) dredges and twenty (20) scows, more particularly described as follows:

Dredges

Name	Kind	Capacity	Condition
No. 1	Combination D. & C	4,000 yards	Good.
No. 2	Hydraulic	5,000 yards	Being Rebuilt.
No. 3	Hydraulic	3,000 yards	Good.
No. 4	Hydraulic	6,000 yards	Good.
No. 5	Dipper	1,000 yards	Good.
Columbia	Dipper	2,000 yards	Good.
Yale	Dipper	800 yards	Good.

[fol. 27]

Scows

Name or number	Kind	Capacity	Condition
41, 43, 45, 49, 51	Valve Bumpers	1,600 cu. yds. each	Good.
10, 12, 16	Deck	500 cu. yds. each	Good.
25, 30	Dump	300 cu. yds. each	Good.
19, 47, 57, 59	Dump	1,600 cu. yds. each	Good.
7, 8, 9	Dump	100 cu. yds. each	Good.
10	Dump	480 cu. yds. each	Good.
16, 12	Dump	626 cu. yds. each	Good.

The bidder will state here whether he is now or ever has been engaged on any contract or other work similar to that proposed; if

he is now, he will give the nature and location of the work; if he has been, he will give, in addition to the location and nature of the work, the year in which it was done, the manner of its completion, and such other information concerning such work as woll show his ability to vigorously prosecute the work required by the accompanying specifications.

The Manager of this Plant has been engaged in this Class of Work for many years, i. e., Hudson River, U. S. Contract, 1900 to 1906, Completed O. K.

Newark Bay & Passaic River, 1904 to 1906, Completed O. K. New Haven, Conn., U. S. Contract, Completed O. K. Great South Bay, 1904, Completed O. K. Patchogue River, 1906, Completed O. K. Staten Island Sound, 1904, Completed O. K., and at least 50 other contracts.

We (or) I make this proposal with a full knowlege of the kind, quantity, and quality of the work required, and, if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the time designated in the specifications, with good and sufficient sureties for the faithful performance thereof.

(Signature) Midland Land & Improvement Co., by William C. Fisk, Pres., (Address) 62 Cedar St., New York City.

(Signed in duplicate.)

[fol. 28] "EXHIBIT B" TO PETITION

Form 19B

Whereas, on the 12th day of August, 1907, a contract was entered into between Colonel D. W. Lockwood, Corps of Engineers, United States Army, representing the United States of America, of the first part, and Midland Land & Improvement Company, of New York, in the County of New York, State of New York, hereinafter designated as the contractor, of the second part, for dredging in Newark Bay and Passaic River, New Jersey.

And whereas, it is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified, for the following reasons:

That since the said contract was entered into requests have been made upon the United States by interested parties for the removal of a shoal in the Passaic River on the south side of the present lines of the work now being done under said contract and in the vicinity of Listers Chemical Works, between the Pennsylvania Railroad freight bridge and the Jackson Street highway bridge; and

Whereas, in the river and harbor act approved February 27, 1911, it is provided, that the project for the improvement of the Passaic River below the Montclair and Greenwood Lake Railroad bridge may, in the discretion of the Secretary of War, be so modified as to allow the widening of the channel of the river at bends wherever considered desirable in the interest of commerce and navigation, and provided also, that no additional work shall be done under this

[fol. 29] authority which will increase the total cost of the project given in report submitted in House Document Numbered Four hundred and forty-one, Fifty-ninth Congress, second session, under which project the work embraced in the present contract dated August 12, 1907, is being prosecuted; and

Whereas, The Midland Land & Improvement Company, the contractor above referred to, has offered to do the additional amount of dredging required to widen the channel of the Passaic River in the vicinity of Listers Chemical Works, and at any other bends in the river where considered desirable in the interest of commerce and navigation, at the same rate provided for in said contract of August 12, 1907, namely, sixteen and one-quarter cents (16¼c.) per cubic yard, scow measurement;

Now, therefore, The said contract is, on this 3rd day of August, 1911, hereby modified in the following particulars, but in no others:

That the said contractor, the Midland Land & Improvement Company, shall do the additional dredging required to widen the channel in the Passaic River on the south side of the present lines of the work now being done under said contract in the vicinity of Listers Chemical Works, between the Pennsylvania Railroad freight bridge and the Jackson Street highway bridge, and at any other bends in the river below the Montclair and Greenwood Railroad bridge where considered desirable in the interest of commerce and navigation, and where required by the contracting officer, and to lines to be indicated by the contracting officer in each case; Provided, That the total quantity of material to be removed under the contract dated August 12, 1907, above referred to, and the supplemental [fol. 30] agreement shall not exceed the quantity stated in said contract (4,177,110 cubic yards) by more than 10 per cent.

That the said contractor shall be paid therefor at the rate of sixteen and one-quarter cents (16¼c.) per cubic yard, scow measurement, for all material that shall have been satisfactorily removed and disposed of.

This supplemental agreement shall be subject to the approval of the Chief of Engineers, U. S. Army, and the Secretary of War.

In witness whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written.

Witness: H. Pedlar, as to Wm. T. Rossell, Colonel, Corps of Engineers. Witness: F. W. Watz, Asst. Secy., as to Midland Land & Improvement Co., by Wilbur C. Fisk, Pres.

(Executed in triplicate.)

Approved August 10, 1911. W. H. Bixby, Chief of Engineers, U. S. Army.

Approved August 14, 1911. John C. Scofield, Assistant and Chief Clerk for the Secretary of War in his absence.

[fol. 31] II. AMENDED PETITION—Filed February 27, 1923

To the Honorable the Chief Justice and the Judges of the Court of Claims of the United States:

The claimant, the Midland and Improvement Company, with the consent of the Court first had and obtained, now comes and files this its amended petition herein.

In addition to the work done as set forth in claimant's petition herein, claimant respectfully shows that the payments for the work done in Section 4, under the contracts set forth in claimant's petition, were not made monthly as was done elsewhere under the contracts, and no final estimate was ever made covering this work. The credits and payments made and the material actually dredged to the date of the annulment of the contract, on Section 4, were as follows:

[fol. 32]	Credited (cubic yards)	Actually dredged (cubic yards)
To November 1, 1910	42,000	133,477
November, 1910	46,000	31,467
December, 1910	64,000	17,450
To October 13, 1911	48,000	173,523
To November 11, 1911	90,000	23,580
December, 1911	954*	954
January, 1912	1,328*	1,328
	292,282	381,779
Balance never credited or paid	89,497	

(Ten Day Reports: Papers from the General Accounting Office, filed May 4, 1922.)

Therefore, there is due claimant for dredging said 89,497 cubic yards of material at the contract price of 16¼c per cubic yard, the additional sum of $14,543.26, for which plaintiff asks judgment.

Jurat showing the foregoing was duly sworn to by C. C. Calhoun omitted in printing.

C. C. Calhoun, Attorney for Plaintiff.

[fol. 33] III. GENERAL TRAVERSE

No demurrer, plea, answer, counterclaim, set-off, claim of damages, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

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*Credited to another section by Defendant's engineers.

IV. Argument and Submission of Case.

On February 14, 1923, the case was argued on merits by Mr. C. C. Calhoun, for the plaintiff, and by Mr. Alexander H. McCormick, for the defendant. Plaintiff given leave to amend petition and case passed to Monday, February 19, 1923.

On February 19, 1923, the argument was concluded by defendant and the case submitted. Plaintiff given leave to file an amended petition.

On February 27, 1923, the plaintiff filed an amended petition. (Said amended petition can be found on page 31 of this record.)

[fol. 34] V. **Findings of Fact, Conclusion of Law, and Opinion of the Court by Booth, J.**—Entered April 2, 1923

This case having been heard by the Court of Claims, the court upon the evidence makes the following

Findings of Fact

I

The plaintiff is, and was during the transactions hereinafter set out in these findings of fact, a corporation duly incorporated under the laws of the State of New Jersey with its principal office for the transaction of business in the city of New York.

II

The plaintiff on August 12, 1907, entered into a contract with the United States to dredge and dispose of approximately 4,177,110 cubic yards of material, scow measurement, in Newark Bay and Passaic River for 16¼ cents per cubic yard. The work to be performed under the contract was to dredge a channel 16 feet deep at mean low water from Staten Island Sound through Newark Bay and the Passaic River to the Montclair and Greenwood Lake Railroad bridge, a distance of 10.8 miles, 300 feet wide to the Nairn Linoleum Works, a distance of 9.7 miles, and thence 200 feet wide to the Montclair and Greenwood Lake Railroad, 1.1 miles, and the work was required to begin within 30 days after receipt by the contractor of notice of the approval of the contract (par. 14 of the specif.) and to be prosecuted "with faithfulness and energy."

The specifications, among other things, provided (par. 16) that "A percentage of ten (10) per centum will be reserved from each payment until half of the work under the contract, as estimated by the engineer, has been completed, after which there shall be no further reservation."

The specifications also contained a statement (par. 19) that "The material to be excavated is believed to be mud, sand, and gravel, but bidders are expected to examine the work and decide for themselves as to its character and make their bids accordingly, as the United States will not guarantee the accuracy of this description.

The price per cubic yard will cover the removal of all material encountered, except ledge rock."

[fol. 35] The specifications (par. 21) stipulated that "The required rate of work will be at least 50,000 cubic yards per month, unless otherwise authorized by the engineer. If at any time after the date fixed for beginning the work it shall be found that operations are not being carried on as rapidly as required by the contract, the engineer shall have power, after due notice in writing to the contractor, to employ such additional plant or labor, or to purchase such material as may be necessary to insure the proper completion of the work within the time specified, and the excess cost thereof shall be a charge against any sum due or to become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract." The paragraph also stipulated that "No work will be required in the months of December, January, and February, but it may be continued in these months if the contractor so desires."

On August 3, 1911, the plaintiff entered into a supplemental contract with the Government to widen the channel opposite Lister's Chemical Works, about 4,500 feet above the beginning of the channel in Newark Bay, and at any bends of the Passaic below the end of the channel at Montclair and Greenwood Railroad bridge, the amount of dredging not to exceed 10 per cent of the amount stated in the original contract (4,177,110 cubic yards), the contract to be governed by the same specifications as the first.

The contract and specifications are made a part of these findings by reference thereto.

III

The plaintiff in its proposal, dated June 30, 1907, for the work on which this claim is based said: "The manager of this plant has been engaged in this class of work for many years, i. e., Hudson River U. S. contract, 1900 to 1906, completed O. K.; Newark Bay and Passaic River, 1904 to 1906, completed O. K.; New Haven, Conn., U. S. contract, completed O. K.; Great South Bay, 1904, completed O. K.; Patchogue River, 1906, completed O. K.; Staten Island Sound, 906, completed O. K.; and at least 50 other contracts."

"We make this proposal with a full knowledge of the kind, quantity, and quality of the work required, and if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the time designated in the specifications, with good and sufficient sureties for the faithful performance thereof."

The manager above referred to was John A. Seeley, who made the estimates for the plaintiff's bid, and who was very familiar with the whole stretch of Newark Bay and Passaic River covered by plaintiff's contract, his experience extending over a period of eleven years, and he had been superintendent of a contract for dredging a twelve-foot channel over the same course.

IV

Under the act of March 3, 1905, 33 Stat. 1117, surveys and borings were made by the Engineer office during the months of October, November, and December, 1906, of the channel from a point near the Red Bell Buoy in Newark Bay to the Montclair and Greenwood Lake Railroad bridge over the bay and Passaic River, a distance of 10.8 miles, in a northerly general direction, with a view to deepen- [fol. 36] ing the channel from 12 to 16 feet at mean low water and to determine the character of the material to be removed by dredging. The borings were made with a steel rod an inch and a half in diameter, and were driven into the bottom of bay and river by hand power, and the depth of the water and of each kind of material penetrated was recorded. This was the proper and customary way to make borings where the depths of the water and character of the bottom were such as was found in the channel proposed to be dredged. These borings were 143 in number and are recorded on three separate sheets of the survey. On sheet No. 1 the channel is about 2.2 miles in length and the borings were from 1 to 42, inclusive, and indicate mud, mud and sand, mud and shells, sand, and gravel. On sheet No. 2 the channel is about 3.1 miles in length, and the borings were from 43 to 74, inclusive, and indicate mud, mud and sand, sand, sand gravel and clay, gravel, and clay. On sheet No. 3 the channel is 5.5 miles in length, and the borings are from 75 to 143, inclusive, and indicate mud, mud and sand, sand, sand and gravel, gravel, sand gravel and clay, and bottom bowlders. Gravel, as the term is used in hydrographic engineering, indicates material running from grit to stones 2 inches in diameter, and bowlder, a word used interchangeably with cobblestone, indicates stones from 2½ to 8 inches in diameter, rounded by the action of water in the glacial period. These borings were made by competent men in good faith and according to their best judgment, and whenever they struck a bowlder the fact was recorded, the boring stopped at that place, and they went on to another place for another boring. The material afterwards dredged from the channel corresponded generally to the material indicated by the borings. These sheets were furnished to prospective bidders.

V

The Government engineers in making up their estimates prior to advertising for bids, estimated the cost of dredging the lower reaches of the channel at 26 cents per cubic yard and the upper reaches at 32 cents per cubic yard, the difference in estimates being due to the more difficult character of the material to be dredged and the number of bridges in the upper part of the channel through the draws of which the scows would have to pass. There were four other bids for the work under the contract, ranging from 22.2 cents to 36.4 cents per cubic yard.

VI

Some time in 1905 the New Jersey Dock and Improvement Company was organized by putting into it the Hughes Brothers and Bangs dredging plant and the Newark meadows property containing about 3,500 acres of land, and it was financed by Harvey Fisk and Sons and other New York financiers, and John A. Seely was made manager of the dredging plant. The land at that time was practically worthless and it was the purpose of the company to take contracts for dredging the near-by waters and thereby fill it in with dredged material. After Harvey Fisk and Sons got into the company it proved to be expensive as the taxes were raised on every acre as soon as it was filled in, and the result was that everybody got out [fol. 37] except Fisk & Sons who had to finance the whole concern. They had placed about $350,000 in the business besides spending $135,000 on repairs to the dredging plant. Finally Harvey Fisk and Sons foreclosed its lien on the dredging plant and Newark meadows and bought in the whole property. They then separated the land from the dredging operations and formed two companies, the Newark Meadows Improvement Company and the Midland Land and Improvement Company, and John A. Seeley became manager of the dredging company.

VII

The plaintiff began work on August 28, 1907, at the lower or southern end of the channel near the Red Bell Buoy in Newark Bay, and working in a northerly direction up Newark Bay completed dredging the channel on sheet No. 1 a distance of 2.2 miles, and thence up through the remaining stretch of Newark Bay and Passaic River, shown on sheet No. 2, completed dredging said channel, as shown on said sheet, for a distance of 3.1 miles. On sheet No. 3 plaintiff dredged the channel in the Passaic River there shown for a distance of 3.2 miles, for 2.2 miles of which half or less of the width of the channel was dredged.

When work began the plaintiff had a plant sufficiently powerful to have completed the work in the contract time, and by August, 1909, two years after the work began, it was estimated by the engineer in charge that plaintiff had completed half of the contract work, and it was paid on that basis, less ten per cent thereon ($33,998.15) held as retained percentages under paragraph 16 of the specifications. The plaintiff made good progress until the end of the year 1909, and was considerably in excess of the minimum quantity, 50,000 cubic yards, required by paragraph 21 of the specifications to be dredged per month.

There was no material encountered which plaintiff's plant, before it was allowed to run down, could not handle. It could and did pump clay and cobblestones in its hydraulic dredges, and where stone was dredged plaintiff was paid for dredging them at special prices.

After January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24,

1912. During eight months in which work was required no work was done, and in every month except three plaintiff was in default in its monthly dredging work, and in June, July, August, and September, 1912, it dredged 31,926 cubic yards instead of the minimum required by the contract, 200,000 cubic yards. In dredging the channel to 16 feet in depth, the plaintiff would frequently dredge to a greater depth, one dredge would sometimes dredge to 19 feet, and plaintiff was paid where it dredged to 17 feet; for dredging beyond that depth it was not paid. The plaintiff up to September 24, 1912, dredged 3,153,632 cubic yards under the terms of its contracts, for which it was paid $478,467.05, which, with the percentages of $33,998.15 retained as aforesaid when the work was half completed, amounted to full payment for all material dredged at the contract price of 16¼ cents pre cubic yard. The actual cost to the plaintiff for the work performed was 20¼ cents per cubic yard, a loss of 4 cents per cubic yard or a total loss of $126,145.28 on the whole work performed.

[fol. 38]

VIII

On September 24, 1912, the plaintiff stopped work on the contract. Several months prior to that date all of the stock in the dredging plant, including the retained percentage, was sold to one Frank A. Barnaby for one thousand dollars. The work continued, however, until September 24, 1912, in the name of said company under the management of John A. Seeley. The plant had been gradually running down until at the time the work stopped it was inadequate to perform the contract. Harvey Fisk & Sons, who were not dredgers, wanted to get out of the dredging business.

IX

On November 1, 1912, the plaintiff wrote to the Secretary of War requesting the cancellation of the two contracts. The summary of its letter reads:

"We respectfully submit in support of our position that the contract should be terminated—

"1. Because the difference in cost between excavating and depositing material shown by the borings, and the excavation and depositing of clay, bowlders, and other hard materials actually found, is so materially different and excessive in cost as to be inequitable and unjust, and to require the excavation and disposal of a mass of material not within the terms of the specification at the price bid for the former imposes a burden upon the contractor that is inequitable and unjust.

"2. The bid of this company was justifiably based upon erroneous information and data furnished by the Engineering Department.

"3. For reasons given the contract should be discontinued and terminated, all percentages retained should be paid to the contractor, and this contractor released from all liability thereunder.

"4. The work should be readvertised on correct information without prejudice to this contractor.

"We respectfully request that we be given an opportunity to be heard in this matter and to submit, if you should deem it advisable, evidence to support the contentions urged above.

"We further request that the United States Engineer office at the city of New York be advised of this application; that a consideration thereof is pending in your office; and that pending this consideration no further action may be taken by him prejudicial to this contractor."

To the above letter the Engineer's office in charge of the work wrote on February 8, 1913:

"SIR: Referring to progress of work upon your contract dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., and to the decision of the department upon your application dated November 1, 1912, for cancellation of that contract, I have to say that you should resume dredging at the earliest possible date, and not later than March 1, 1913, and prosecute the work with faithfulness and energy in accordance with the contract. The entire cessation of the work is not contemplated under the contract, although you have attained the required average rate of progress to date upon same.

[fol. 39] "Please advise me of your plans and the date for resuming work, so that the necessary arrangements for inspection by this office may be made."

On February 21, 1913, the Engineer wrote to plaintiff again as follows:

"SIR: Referring to my letter of the 8th instant in reference to work upon the contract of the Midland Land and Improvement Company, dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., please advise me when I may expect a reply."

To this letter plaintiff replied on February 28, 1913:

"COLONEL: Replying to your esteemed favors of February 8th and 21st, in reference to work upon the contract of the Midland Land and Improvement Company dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., we respectfully refer you to our previous correspondence on this subject, wherein we have informed you of our intention to discontinue work on this contract for reasons therein specified.

"Under advice of our attorneys, we have not changed our position in the matter."

Letter from the engineer in charge to the Chief of Engineers, dated March 4, 1913, reads:

"1. Referred.

"2. In pursuance of the advice of the department as contained in paragraph 6 of the 1st indorsement, office of the Chief of Engineers,

dated Feb. 3, 1913, on my letter dated January 15, 1913 (E. D. 63777/52), in reference to progress of work on the contract of the Midland Land and Improvement Company dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., there are inclosed herewith copies of letters from this office to the contractor dated February 8 and 21, 1913, in reference to this work. It appears from paragraph 4 of the department letter above referred to that the contractor will not be in default until July 29, 1913, if the required rate of work, 50,000 cubic yards per month, is used as the required amount of work to be accomplished up to that date.

"3. In view of the information now received from the company, advice is requested as to the propriety of annulling this contract at this time. So far as the practical consideration of this contract is concerned, the contractor abandoned work on September 24, 1912, as referred to in my report dated December 13, 1912 (E. D. 63777/40)."

To this letter the Chief Engineers replied:

"1. Since the contractor has definitely abandoned the contract, as evidenced by letter of the 28th ultimo, the contract should be at once annulled by giving notice to that effect to the contractor and the sureties, preserving evidence of the receipt of such notices. The fact and date of annulment should be reported hereon in returning this paper.

"2. After annulment of the contract recommendation as to the method of completing the work, or other course to be followed, should be submitted.

"By command of the Chief of Engineers."

Letter from engineer in charge to plaintiff dated March 14, 1913:

"SIRS: Referring to your letter of February 28, 1913, in which you have definitely informed me that you have discontinued work on your contract for dredging in Newark Bay and Passaic River, N. J., dated [fol. 40] August 12, 1907, I have to inform you that this contract, with its supplementary contract dated August 3, 1911, is hereby anulled, with the sanction of the Chief of Engineers, and that arrangements will be made to secure the performance of the uncompleted work in accordance with paragraph 4 of the contract."

No protest had been made by plaintiff as to the character of the material to be dredged up to its letter of November 1, 1912, requesting the cancellation of the contract.

X

The distance plaintiff would have been compelled to transport its material to sea, if it had not had a dumping ground on its own property, the Newark meadows, would have been from 28 to 35 miles from the beginning of the channel in Newark Bay, with an increasing distance as it progressed upwards with its work. It would have been required also to obtain a permit from the New York City gov-

ernment for every scow load dumped into the sea with a city inspector on board to see that it was dumped at the proper place. The evidence does not show how much of plaintiff's swamp land was filled in under this contract, but does indicate that a considerable part of the 3,500 acres was thus reclaimed. The filling in work had been going on before plaintiff began work on this contract and was continued through other contractors after it had abandoned its contract. The value of the land after filling in was increased $12,000 per acre over its value prior thereto, or a total increase for the 3,500 acres of $42,000,000. This land became very valuable after the World War began in 1914, when factories were started in Newark and the Government began a shipyard there, and part of the reclaimed land sold for a large sum of money.

XI

After the work was abandoned by the plaintiff and the two contracts canceled as described in Finding IX, the uncompleted part of the work was advertised August 16, 1913, on the same specifications, surveys, and borings, and was awarded to Eugene Breymann at 26⅞ cents per cubic yard, scow measurement, contract dated October 10, 1913, who completed the work. The amount of material dredged by him was 1,328,257 cubic yards. The surplus dredged by plaintiff over the minimum requirement of the contract at the time it stopped work on September 24, 1912, was exhausted by said requirement several months before work was begun under the Breymann contract.

The total cost to the Government for dredging 1,328,257 cubic yards at 26⅞ cents per cubic yard was $356,969.07. If the plaintiff had completed its contract the cost would have been, at 16¼ cents per cubic yard, $215,841.76, a difference of $141,127.31, and $107,129.16 more than the retained percentages sued for.

XII

What became of the books and stock of the plaintiff company has not been satisfactorily shown by the evidence. The charter of the company was forfeited for nonpayment of taxes, after which, at the [fol. 41] request of the said Frank A. Barnaby, one Charles R. Wilson and William B. Firmin agreed to act as president and secretary of said company, respectively, and their only official act was to execute the power of attorney appointing Charles F. Wood, attorney in fact, to prosecute this suit. Neither Wilson, Firmin, nor Wood owned any stock in said company, nor had any interest in the two contracts between said company and the United States, nor in the retained percentages, nor did the said Frank A. Barnaby own any stock of record in said company at that time. What interest he or anyone else now has in said company is not shown by the evidence.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and the petition is dismissed. Judgment is rendered against the plaintiff

in favor of the United States for the cost of printing the record in this case, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

BOOTH, Judge, delivered the opinion of the court.

Under the terms of a written contract the plaintiff company assumed obligations to dredge and dispose of 4,177,110 cubic yards of material, scow measurement, in Newark Bay and Passaic River for the sum of 16¼ cents per cubic yard. The dredging work provided for in the contract was intended to secure for the defendant a channel 16 feet deep at mean low water, extending 10.8 miles from Staten Island Sound to the Montclair and Greenwood Lake Railroad bridge. It was to be 300 feet wide for a distance of 9.7 miles and 200 feet from there on, a distance of 1.1 miles, and the contract so provided. Work was to commence within a month after the contractor received notice of the approval of the contract, and was to be prosecuted faithfully and diligently. The specifications, which are made a part of the contract, contained a provision for the retention by the defendant of 10 per cent of all payments made thereunder, until half of the work was completed, a fact to be determined by the engineer, and thereafter the plaintiff was to receive payment in full. The work under the contract progressed without any undue friction, and in a manner satisfactory to both parties, until January 1, 1910. As a matter of fact there was no complaint lodged against the contractor, and none could have been. Subsequent to this time trouble began to develop. The plaintiff fell far below its theretofore efficiency, until at last on September 24, 1912, it ceased work entirely, ascribing its difficulties to a distinct change in the character of the material encountered, a difference so violent as to amount, according to the allegations of the petition, to misrepresentation upon the part of the defendant in its specifications. On November 1, 1912, the plaintiff wrote the Secretary of War asking to be relieved from its contract, and predicating its request upon the substantial difference between the character of the material to be dredged, as shown in the specifications, and that actually encountered in the performance of the work, stating the difference to be such as to make the cost of removing the same inequitable and unjust to the contractor. The Chief of Engineers declined to accede to plaintiff's request, notified the company [fol. 42] to proceed with the work, and upon its failure to do so, annulled the contract on March 14 ,1913. The contract provided for such a proceeding, and paragraph 4 thereof authorized the defendant to relet the work and recoup the difference in price, if any, from the first contractor. This course was followed by the defendant. The plaintiff company had been paid for all work done up to September 24, 1912, except an alleged mistake in computation included in this suit, and $33,998.15 retained percentages withheld by the defendant under the provisions of the contract. This suit is for the recovery of both items, the $33,998.15 retained and $14,543.26, an alleged underpayment. We have not said anything about the supplemental agree-

ment between the parties executed August 3, 1911, because it in no way varies the issue, except argumentatively.

If the facts in this case correspond with the facts in the cases of Christie v. United States, 237 U. S. 234, and Hollerbach v. United States, 233 U. S. 165, the plaintiff is entitled to judgment. Of course, such a result might follow, even though there be no such similarity. Inasmuch, therefore, as the contention made indispensably involves a discussion of the facts, the court has endeavored to find them from a record not especially contradictory nor involved.

The contract sued upon was the result of a public advertisement for bids to do the contemplated work. As usual, the defendant made public and available to bidders such information respecting the work as it possessed, which bidders might call for. The plaintiff company was manifestly anxious and deeply concerned in its efforts to procure the contract, for its bid for the same was so decidedly beneath all others that it is inconceivable that experienced engineers would have dreamed of the undertaking at such a figure, unless some other and outside consideration inspired it. The plaintiff company, prior to submitting its bid, had before it subdivision (c) of paragraph 19 of the specifications, as follows:

"Character of Material. The material to be excavated is believed to be mud, sand, and gravel, but bidders are expected to examine the work and decide for themselves as to its character and make their bids accordingly, as the United States will not guarantee the accuracy of this description. The price per cubic yard will cover the removal of all material encountered except ledge rock."

It also had before it borings or soundings shown on three separate sheets, 143 in number, made in November and December, 1906, disclosing conditions found over a distance of 10.8 miles, and conveniently divided into three separate areas, the first sheet disclosing borings in 42 separate places over a distance of 2.2 miles, the second indicating the result at 32 separate places over a distance of 3.1 miles, and the third showing the balance of the 143 over a distance of 5.5 miles. In addition to the above three blue prints, a report made by the Chief of Engineers of the Army to Congress and published as a public document was furnished to the contractor by the defendant, in which it was said, among other things: "On the whole, the dredging would be comparatively easy and the cost moderate." Irrespective of this information, the plaintiff company in its proposal, without solicitation or requirement, voluntarily stated that it possessed "full knowledge of the kind, quantity, and quality of the work required," and agreed to do the work for 16¼ cents per cubic yard, [fol. 43] when the estimate of cost prepared by the engineers ran from 26 cents, for the lower, to 32 cents for the upper reaches of the area, and no other bidder had submitted a figure less than 22 cents.

Fraud and misrepresentation is frequently difficult to prove, but in this class of cases, wherein it most generally is to be deduced from printed documents, maps, and the blue prints, and the influential

effect of the same upon bidders, the conclusion as to its existence or non-existence is not quite so involved as the reconciliation and analysis of oral testimony, keeping in mind, of course, that we are speaking of constructive rather than actual and intended deceit. However, the rule is not to be relaxed. The court must not only find the representations to have been false, but, being so, did actually mislead the bidder who obtained the contract. Christie v. United States, supra.

The burden of proving misrepresentation rests upon the party making the allegation. It is not to be presumed, and one may not, either under the Christie or Hollerbach case, simply show a different condition in some respects from that which the chart or blue prints of borings discloses, and rest his case upon the theory that the court must infer a misrepresentation. There must be some degree of culpability attached to the makers of the maps and charts, either that they were knowingly untrue or were prepared as the result of such a serious and egregious error that the court may imply bad faith. The many contract cases in this court, too many to cite, sustain this principle.

The plaintiff had in its employ as manager and superintendent of its dredging plant Mr. John A. Seeley, an exceedingly competent man. Mr. Seeley made the estimate upon which the company made its bid and had entire charge of the dredging operations. Mr. Seeley had been for eleven years engaged in dredging over this identical area; he was thoroughly familiar with all local conditions, and while he had not dredged a channel deeper than 12 feet over this same course, he had completed one to that depth, and in so doing it is incredible that he was unfamiliar with the common character of the material to be dredged. Doubtless it was he who wrote into the plaintiff's proposal that the company was familiar "with the kind, quantity, and quality of the work required." Was Seeley, and thereby the plaintiff, deceived by the blue prints? It might well be argued that one of his long experience would not commit the monumental blunder of doing the work called for at such a reduced price unless he was misled as to the character of the material to be removed and the difficulties to be apprehended in performing the contract. The force of such a contention is effectually dispelled when Seeley's relation to the contract and those interested in the venture, as shown by the record, discloses itself. The origin and organization of the plaintiff company and its affiliation with the Newark Meadows Improvement Company is fully set forth in Finding VI. The ownership of the two companies was identical, and it was the indisputable purpose and intention, as a part of a large and important enterprise, to secure this contract—hence the obviously low bid—in order to secure a sufficient quantity of material to fill in and fill up a large area—about 3,500 acres—of swamp lands adjoining the lower reaches of the area to be dredged, acquired by the Newark Meadows Improvement Company, and at the time [fol. 44] practically worthless unless filled in. It is true the Newark Meadows Improvement Company agreed to pay ten cents per cubic yard for the material furnished, but this was in the end more

apparent than real. As a matter of fact, proven and not seriously disputed, the enterprise as a whole resulted in immense profits, as shown in Finding X, notwithstanding the dredging contract was performed to the date of abandonment at a serious loss. There was nothing wrong in this transaction, and there is no purpose to ascribe any irregularity to it. The parties had a perfect right to undertake it; nevertheless, it is a most potent factor in the determination of the issue as to being misled by the representations of the Government. It seems hardly possible to conclude that Seeley was misled as to local conditions, about which he knew as much as the Government officers. As to the borings themselves, the way employed to make them appears in Finding IV. It was not unusual. The character of material dredged within the limits of the borings shown on blue print #1 is not complained of, except when included in the general average to make up the full percentage of alleged errors. The borings in this stretch of 2.2 miles show "mud, mud and sand, mud and shells, sand and gravel," and yet the ten-day reports exhibit a strata of clay along the entire area. Clay is shown along with the above materials, in some instances hard enough to put the pumps of the plaintiff out of commission, and no complaint of any kind or character was lodged with the defendant respecting work in this area. On the other hand, it was done in a most expeditious manner, the quantities dredged being far in excess of the amounts required under the contract, and the same situation obtained as to operations under the second blue print except that the borings covering this section of 3.1 miles did show the presence of clay. It was not until the plaintiff company had completed fully, or very nearly so, two-thirds of the work that complaint was made, over five years after it had begun work, and at a time when it became more expensive to operate because so far away from a dumping base. It matters not, in so far as the performance of the contract work is concerned, what was the character of the soil in the first two areas dredged. Surely there was no misrepresentation as to these two areas, for the plaintiff company found the work easy and progress rapid. It claims, and justly so, great credit for efficiency in this respect. It was not until after a very considerable portion of the work embraced in the third area shown on blue print three was done that the plaintiff disavowed the accuracy of the blue prints and entered its protest, an area more than five miles from the area already dredged, a considerable distance away from the Newark Meadows Improvement Company's land, and an area manifestly more expensive to dredge because farther away from the place of deposit.

There is no proof here that the borings did not show exactly what the officers taking them found. While they may not have shown clay as present at each point where the borings were made, they do disclose the presence of clay where clay was found, and in addition show clay present at a sufficient number of places to put the contractor on notice of its presence in the bottom of the channel, and thereby warn him of difficulties to be anticipated. It is not disputed, and may not be, that whenever the steel rod ran upon a bowlder the fact was recorded and the boring apparatus moved to another place

[fol. 45] for another boring. The record confirms the statement that the material dredged conformed generally to the material indicated by the borings, and no more could be done and no more is required. The facts are totally unlike the record in the Christie case. In the latter case borings were made, and if a log was encountered the officer moved the boring apparatus to a point free from logs, and then recorded it as having been made at exactly the point where the log was found, thus leading the contractor to believe that no logs had appeared at this point, when, as a matter of fact, the log was there, had been found but not recorded at all. There can be no misrepresentation in borings recorded as in this case where the record shows beyond doubt that what the borings indicate was correctly and honestly stated on the boring sheets. It would be difficult, even under circumstances a little more favorable to the plaintiff, to hold that an actual misrepresentation as to the borings was in all respects the moving and primary cause of plaintiff's refusal to proceed with the contract. The plaintiff undertook the work at too low a figure, profits were being absorbed, and it was losing money. The contract was growing in burdensomeness, and the plaintiff found it impracticable, although it might have done so, to longer pump its dredged material on the Newark Meadows Improvement Company's lands. The plaintiff's plant was allowed to deteriorate and an accumulating variety of discouraging factors faced the plaintiff if it continued to operate as it had done before. The motive to seize upon most any cause for discontinuance was present.

The plaintiff is suing only for the retained percentages and underpayment, and while it seeks to justify its procedure and positively disclaims any intent to an actual, voluntary abandonment of its contract, and charges the defendant with a breach thereof, no claim is made for damages other than as stated above. This claim we believe to be untenable. The findings show the true state of facts as we view them from the record, with respect to the underpayment claim, and we do not think it necessary to further discuss this item of the claim. It does appear from the evidence that the plaintiff was paid for all the material he was entitled to be paid for under the contract.

It is somewhat doubtful, in view of the facts, whether this suit may be maintained at all under the present status of the corporation. The testimony reveals the fact that before the plaintiff refused to proceed with the contract all stock in the corporation, including the dredging plant, was sold to Frank A. Barnaby for $1,000, including this claim. The charter of the company was forfeited for nonpayment of taxes and the facts incident thereto appear in Finding XII. It may be that the reorganization of the corporation and the election of officers was not in all respects legal. At any rate, there is not sufficient evidence in the record to hold otherwise. The defendant was content to rest the issue on this meager showing of fact, and we are not convinced that we would be warranted in dismissing the case on this issue alone. The allegations of the petition, not contradicted except as above, disclose the status of the plaintiff, and we have given the facts appearing of record as requested.

The petition will be dismissed. It is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge; and Campbell, Chief Justice, concur.

[fol. 46] VI. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Second day of April, A. D., 1923, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Two hundred and seventy-nine dollars and twelve cents ($279.12), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VII. HISTORY OF PROCEEDINGS AFTER ENTRY OF JUDGMENT

On June 1, 1923, the plaintiff filed a motion for a new trial.

On January 28, 1924, plaintiff's motion for a new trial was argued and submitted by Mr. C. C. Calhoun, for the plaintiff, and submitted, without argument, by Mr. Arthur Cobb, for the defendant.

On February 18, 1924, the court filed an order overruling plaintiff's motion for a new trial.

[fol. 47] VIII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed May 15, 1924

From the judgment in the above-entitled cause, on the 18th day of February, 1924, in favor of the defendant, the plaintiff, by its attorney of record, on the 15th day of May, A. D., 1924, makes application for and gives notice of an appeal to the Supreme Court of the United States.

C. C. Calhoun, Attorney of Record for Midland Land and Improvement Company.

IX. Order of Court Allowing Plaintiff's Application for Appeal—Filed May 26, 1924

On this 26th day of May, 1924, it is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

By the Court.

[fol. 48] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Booth, J.; of the judgment of the court; of the history of proceedings after entry of judgment; of the plaintiff's application for an appeal and of the order of the court allowing said application:

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 31st day of May, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 30,435. Court of Claims. Term No. 470. Midland Land and Improvement Company, appellant, vs. The United States. Filed June 23rd, 1924. File No. 30,435.

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IN THE

Supreme Court of the United States

October Term, 1925.

No. 105.

MIDLAND LAND AND IMPROVEMENT COMPANY, *Appellant*,
vs.
THE UNITED STATES, *Appellee*.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT.

This is an appeal from a judgment of the Court of Claims in favor of appellee and dismissing the petition of appellant.

To avoid confusion the appellant will hereinafter be referred to as the contractor, and the appellee as the defendant.

In the suit it was sought to recover the retained percentages amounting to $33,998.15, upon the following grounds:

(1). That the defendant had wrongfully annulled the contract.

(2). That the defendant had not shown that the uncompleted work was done under another contract which did not materially depart from the annulled contract,

and that it was incumbent upon the defendant to show this.

On August 12, 1907, the contractor entered into a contract with the defendant whereby the contractor agreed to dredge approximately 4,177,110 cubic yards of material in order to form a channel through Newark Bay and Passaic River, New Jersey. On August 3, 1911, a supplemental contract was entered into between the parties which provided for the widening of the channel within certain points and an increase in materials to be dredged by an amount not to exceed ten per centum of the amount of material specified to be dredged under the terms of the original contract. The price of work under both contracts was 16¼ cents per cubic yard, scow measure.

In paragraph 16 of the first contract the following provision is made:

> "A percentage of ten (10) per centum will be reserved from each payment until half the work under the contract, as estimated by the engineer, has been completed, after which there shall be no further reservation. The reserve percentage will be paid upon the satisfactory completion and final acceptance of the work." (R. p. 8)

Paragraphs 14 and 21 of the general specifications, which were a part of the first contract, relate to the time of commencement and rate of progress. They read as follows:

> "14. The contractor will be required * * * to prosecute said work with faithfulness and energy in accordance with paragraph 21, (R. p. 8)
>
> * * * * * * * *
>
> "21. *Rate of work and date of completion.* Work must be commenced and prosecuted as provided in paragraph 14. No work will be required in the months of December, January and February, but it may be continued in these months if the contractor so desires. The rate of work will be at least 50,000 cubic yards per

month, unless otherwise authorized by the engineer. If at any time after the date fixed for beginning the work it shall be found that the operations are not being carried on as rapidly as required by the contract, the engineer shall have power, after due notice in writing to the contractor, to employ such additional plant and labor, or to purchase such material as may be necessary to insure the proper completion of the work within the time specified, and the excess of cost thereof over what the work would have cost at the contract rate shall be a charge against any payments due or to become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract." (R. p. 11.)

In paragraph 4 of the contract is found the following provision:

"4. If, in any event, the party of the second part * * * shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money and reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those

payable by the United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law." (R. p. 4)

The contractor commenced work under the contract on August 28, 1907, within the required time, and on March 14, 1913, it had dredged and removed from the specified channel 3,153,632 cubic yards of material, for which it was paid $478,467.05, and defendant had retained $33,998.15, in accordance with the terms of the contract.

It was for the recovery of the sum of $33,998.15, the amount of the retained percentage, that this action was instituted.

CONTRACTOR'S APPLICATION TO SECRETARY OF WAR TO BE HEARD ON QUESTION OF TERMINATION OF CONTRACT.

On November 1, 1912, the contractor wrote to the Secretary of War requesting to be heard on the question of the termination of the two contracts, (R. p. 22). The summary of said letter is as follows:

"We respectfully submit in support of our position that the contract should be terminated—

"1. Because the difference in cost between excavating and depositing material shown by the borings, and the excavation and depositing of clay, bowlders, and other hard materials actually found, is so materially different and excessive in cost as to be inequitable and unjust, and to require the excavation and disposal of a mass of material not within the terms of the specification at the price bid for the former imposes a burden upon the contractor that is inequitable and unjust.

"2. The bid of this company was justifiably based upon erroneous information and data furnished by the Engineering Department.

"3. For reasons given the contract should be discontinued and terminated, all percentages retained should be paid to the contractor, and this contractor released from all liability thereunder.

"4. The work should be readvertised on correct information without prejudice to this contractor.

"*We respectfully request that we be given an opportunity to be heard in this matter and to submit, if you should deem it advisable, evidence to support the contentions urged above.* (Emphasis ours.)

"We further request that the United States Engineer office at the city of New York be advised of this application; that a consideration thereof is pending in your office; and that pending this consideration no further action may be taken by him prejudicial to this contractor." (Rec. p. 22.)

Without giving the contractor an opportunity to be heard on the question of terminating the contracts, the Engineers Office, on February 8, 1913, wrote as follows:

"Referring to progress of work upon your contract dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., and to the decision of the department upon your application dated November 1, 1912, for cancellation of that contract, I have to say that you should resume dredging at the earliest possible date, and not later than March 1, 1913, and prosecute the work with faithfulness and energy in accordance with the contract. The entire cessation of the work is not contemplated under the contract, *although you have attained the required average rate of progress to date upon same.* (Emphasis ours.)

"Please advise me of your plans and the date for resuming work, so that the necessary arrangements for inspection by this office may be made." (Rec. p. 23)

On February 21, 1913, the Engineer again wrote appellant as follows:

"Referring to my letter of the 8th instant in reference to work upon the contract of the Midland Land and Improvement Company, dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., please advise me when I may expect a reply." (Rec. p. 23.)

To this letter the contractor's treasurer replied, on February 28, 1913, as follows:

"Replying to your esteemed favors of February 8th and 21st, in reference to work upon the contract of the Midland Land and Improvement Company dated August 12, 1907, for dredging in Newark Bay and Passaic River N. J., we respectfully refer you to our previous correspondence on this subject, wherein we have informed you of our intention to discontinue work on this contract for reasons therein specified.

"Under advice of our attorneys, we have not changed our position in the matter." (Rec. p. 23.)

On March 4, 1913, the engineer in charge of the work wrote to the Chief of Engineers as follows (R. p. 23):

"1. Referred.

"2. In pursuance of the advice of the department as contained in paragraph 6 of the 1st indorsement, office of the Chief of Engineers, dated February 3, 1913, on my letter dated January 15, 1913 (E. C. 63777/52, in reference to progress of work on the contract of the Midland Land and Improvement Company dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., there are inclosed here with copies of letters from this office to the contractor dated February 8 and 21, 1913, in reference to this work. *It appears from paragraph 4 of the department letter above referred to that the contractor will not be in default until July 29, 1913, if the required rate of work, 50,000 cubic yards per month, is used as the required amount of work to be accomplished up to that date.* (Emphasis ours.)

"3. In view of the information now received from the company, advice is requested as to the propriety of

annulling this contract at this time. So far as the practical consideration of this contract, the contractor abandoned work on September 24, 1912, as referred to in my report dated December 13, 1912 (E. D. 63777-40)." (Rec. pp. 23-24.)

The Chief of Engineers replied as follows:

"1. Since the contractor has definitely abandoned the contract, as evidenced by letter of the 28th ultimo, the contract should be at once annulled by giving notice to that effect to the contractor and the sureties, preserving evidence of the receipt of such notices. The fact and date of annulment should be reported hereon in returning this paper.

"2. After annulment of the contract recommendation as to the method of completing the work, or other course to be followed, should be submitted." (Rec. p. 24)

On March 14, 1913, the engineer in charge advised the contractor that the two contracts had been annulled. Said letter reads as follows:

"Referring to your letter of February 28, 1913, in which you have definitely informed me that you have discontinued work on your contract for dredging in Newark Bay and Passaic River, N. J., dated August 12, 1907, I have to inform you that this contract, with its supplementary contract dated August 3, 1911, is hereby annulled, with the sanction of the Chief of Engineers, and that arrangements will be made to secure the performance of the uncompleted work in accordance with paragraph 4 of the contract." (Rec. p. 24.)

The work covered by the contracts, having been taken out of the hands of the contractor, the defendant entered into a contract with one Eugene Breyman, who removed from the area of the channel covered by the first contract, 1,328,257 cubic yards of material at the price of 26 7/8c per yard, and for the total sum of $356,969.07. No material

was removed by Breyman from the area covered by the second contract; his work being limited to the area covered by the first contract only.

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

FIRST: In not holding that up to the time the defendant annulled the contracts and took the work out of the contractor's hands, the contractor had removed a greater quantity of material than was required by the contracts.

SECOND: In holding that the letters of the contractor dated November 1, 1912, and February 28, 1913, constituted a renunciation by the contractor of the obligations of the contract, and in holding that the annulment of the contract by the defendant upon the statements contained in these two letters was justified and legal.

THIRD: In not holding that it was incumbent upon the defendant to show that the uncompleted part of the work covered by the contractor's contracts had been completed under a contract and specifications which did not materially differ or substantially depart from the old contract and further in not holding that defendant had failed to show that the uncompleted part of the work had been so completed.

FOURTH: In failing to hold as a conclusion of law, that the contractor was entitled to recover of defendant the sum of $33,998.15.

FIFTH: In entering a judgment dismissing the petition of the contractor.

ARGUMENT.

I.

RATE OF PROGRESS.

It is contended upon the part of the contractor that at the time the defendant annulled the contracts, thereby making it impossible for the contractor to carry on the work under the contracts to completion, the contractor was not in default in the matter of the quantity of material required by the contracts to be removed previous to that date, and that the contractor had not renounced its obligations under said contracts.

The Court will observe that paragraph 21 of the specifications, heretofore set out in full, provides that the rate of work will be at least 50,000 cubic yards per month, for nine months of the year, unless otherwise authorized by the engineer. (R. p. 11.) No work was required for December, January and February.

The reasonable construction of the expression, "The rate of work will be at least 50,000 cubic yards per month", is that material should be removed at the average rate of 50,000 cubic yards per month. Any other construction would clearly result in an absurdity.

But the parties to the contract did, during the progress of the work, construe the language to mean, "at the average rate of 50,000 cubic yards per month."

On this point the attention of the Court is invited to certain letters referred to above, and which are set out in the findings of fact.

On February 8, 1913, the Engineer's office, in writing to the contractor, said:

> "The entire cessation of work is not contemplated under the contract, *although you have attained the required average rate of progress to date upon same.*" (Italics ours.) (R. p. 23.)

And on March 4, 1913, the Engineer in charge of the work, advised the Chief of Engineers that;

> "It appears from paragraph 4 of the department letter above referred to that *the contractor will not be in default until July 29, 1913, if the required rate of work, 50,000 cubic yards per month, is used as the required amount of work to be accomplished up to that date.*" (Italics ours.) (R. p. 24)

The Courts have uniformly held that, where the parties to a contract have adopted a construction of the same, and have proceeded to carry out the requirements of the contract in accordance therewith, then such a construction will be upheld by the Court. This rule has been followed by this court in the following cases: District of Columbia vs. Gallaher, 124 U. S. 505; Chicago vs. Sheldon, 9 Wall. 50, 54; Tysliff vs. Tysliff, 122 U. S., 121, 131.

It is, therefore submitted that the contract when read as a whole, only required that the contractor should remove material at the average rate of 50,000 cubic yards per month for nine months of the year. If, however, there is any doubt about such being the meaning, then the parties have so construed the same, and such a construction will be followed.

II.

WORK PROSECUTED WITH FAITHFULNESS AND ENERGY.

It appears from the findings of facts that at the time the contracts were annulled by the defendant, the contractor had exceeded by a large amount the average rate of 50,000 cubic yards per month. The contracts were annulled on the 14th day of March, 1913, and according to the letter of the engineer in charge to the Chief of Engineers, of March 4, 1913, there would have been no default in quantity of material to be dredged, without further dredging in the meantime, until July 29, 1913. (Finding No. IX, Rec. pp. 23, 24.)

In arriving at this date of July 29, 1913, when the contractor would be in default, the engineer estimated that if the contractor undertook to do any dredging at all during the months of December, January and February, the three exempted months, then it should be charged with the full rate of 50,000 cubic yards per month regardless of the small amount dredged in that particular month. Applying this harsh rule the contractor was at the time of the annulment, four and one-half months ahead of the requirements.

It is respectfully submitted that if the contractor took the chances of dredging during the exempted months of December, January and February, then the yardage dredged during these months should have been credited to the contractor on the amount of yardage required for the nine dredging months. Applying this rule, the contractor at the time of the annulment, was ahead of the requirements of the contract by *fourteen and one-half months with an excess in material of about 725,000 cubic yards.*

The contract, in paragraph 4 (Rec. p. 4), has the following provision:

> "If, in any event, the party of the second part * * * shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annual this contract * * *."

The Court will observe that the expression "faithfulness and energy" means, and contemplated nothing more, than the fulfillment of the requirement of paragraph 21 of the specifications relative to the rate of progress. No greater rate of progress could have been required than the average rate of 50,000 cubic yards per month, and if such a rate was maintained by the contractor, then it was not possible to charge a lack of "faithfulness and energy." Any other construction of the meaning would render the requirement

to dredge at the average rate of 50,000 cubic yards per month meaningless, and without significance in fixing the obligations of the contractor.

If there is any doubt of the meaning and significance of the expression "faithfulness and energy," then we invite the attention of the Court to the following language of paragraph 21:

> "If at any time after the date fixed for beginning the work it shall be found that operations are not being carried on as rapidly as required by the contract, the engineer shall have power, after due notice in writing to the contractor, to employ such additional plant and labor, or to purchase such material as may be necessary to insure the proper completion of the work within the time specified." (R. p. 11.)

Under the provision of the specifications just quoted, no additional plant could be put upon the work by the defendant unless the work was not being carried on as repidly as specified by the contract, and then only to insure the completion of the work within the time required at 50,000 cubic yards per month for nine months per year.

Furthermore, said provision makes it very plain that the contractor will not be in default if materials are removed, at the rate of 50,000 cubic yards per month, for nine months per year, and that if materials are removed at such rate, then the contractor will have proceeded with faithfulness and energy.

On this point, therefore, the conclusion must be that the contractor did fulfill the provision of the contract with reference to the rate of work, and that an annullment of the contract by defendant was not justified on that account.

III.

THE CONTRACTOR DID NOT BREACH THE CONTRACT BY A REPUDIATION THEREOF.

The Court will observe from the correspondence which is set out in the findings of fact (R. p. 22) and also in the statement of the case herein, that defendant did not annul the contract on account of the failure of the contractor to maintain the average rate of 50,000 cubic yards per month as was required, but, because of the contractor's letter of February 28, 1913 (R. p. 24).

The contractor maintains that its suspension of dredging was temporary and not a breach of the contract; that it had a right under the terms of the contract to operate its dredging plant on each day in the month or every other day in the month, or every month in the year, or every other month in the year, just as long as the average rate was maintained. That this contention is correct has never been controverted by the defendant.

NO REPUDIATION OF CONTRACT IN LAW.

Whether there has been a repudiation of the obligations of a contract when the performance is not yet due, thereby creating an anticipatory breach thereof, is a question of law. On behalf of the contractor it is contended that from the facts found by the Court of Claims, there was not in law a repudiation of the contract and an anticipatory breach thereof.

The renunciation of the obligations of the contract by the contractor appears, if at all, either in a letter of the contractor addressed to the Secretary of War, dated November 1, 1912, wherein a request was made for a hearing on the question of a termination of the contract, or in the letter of February 28, 1913, of the Treasurer of the contractor to William T. Rossell, Colonel. The Engineer in charge said it was solely on the letter of February 28, 1913. He said:

"Referring to your letter of February 28, 1913, in which you have definitely informed me that you have discontinued work on your contract * * * I have to inform you that this contract, with its supplemental contract, dated August 3, 1911, is hereby annulled." (R. p. 21.)

The Court, in finding IX (R. p. 22) said:

"November 1, 1912, the plaintiff wrote to the Secretary of War requesting the cancellation of the two contracts."

Nowhere in the record, and nowhere in the evidence given in the court's finding is it shown that the contractor requested "the cancellation of the two contracts." What the contractor did do, was to make APPLICATION to the Secretary of War TO BE HEARD on the question of whether the contract should be terminated and discontinued. (Finding IX, R. p. 22.)

In the immediately succeeding paragraph the Court quotes from the contractor's application:

"We respectfully submit in support of our position that the contract should be terminated * * *. For reasons given the contract should be discontinued and terminated. * * *

"We respectfully request that we be given an opportunity to be heard in this matter * * *.

"We further request that the U. S. Engineer Office in the city of New York be advised of this application; that a consideration thereof is pending in your office, and that pending this consideration no further action may be taken by him prejudicial to this contract." (Finding IX, R. pp. 22-3.)

On February 28, 1913, the contractor, after acknowledging the receipt of the two letters from the defendant's engineer in charge of the work, wrote:

"We respectfully refer you to our previous correspondence on this subject, wherein we have informed

you of our intention to discontinue work on this contract for reasons therein specified.

"Under advice of our attorneys we have not changed our position in the matter." (Finding IX, R. p. 23.)

Change what position? Their application to the Secretary of War to be heard on the question as to whether the contract should be terminated. They had not been heard, and their intention to discontinue work pending this application to be heard had not been changed. Through that entire application the contractor stated that the contract "should be terminated," or "should be discontinued." Never once that it had determined to discontinue the work permanently or to terminate the contract.

There can be no question that defendant's engineer in charge so interpreted this application of November 1, 1912 (R. p. 22) for as late as February, 1913, the engineer in charge wrote the contractor directing that work be resumed not later than March 1, and said:

"Please advise me of your plans and the date for resuming work, so that the necessary arrangements for inspection by this office can be made." (R. p. 23.)

This clearly indicates that the engineer in charge did not construe the application of November 1, 1912, to be a renunciation of the contract, but actually expected the contractor to begin work in a very short while. And on February 21st this request was renewed. (R. p. 23.)

According to this, not until after the receipt of the letter from the contractor's treasurer of February 28, 1913, did the engineer in charge of the work assume to decide that the contractor had renounced the contract.

SIGNIFICANCE OF APPLICATION.

Application to be heard on the question of the termination of the contract implies that the termination had not

at that time been definitely determined upon, and that it would come through the consent of the parties.

The Court completely lost sight of the significance of this application addressed to the Secretary of War to be heard on a most vital and important matter. Of course, in the application the questions upon which the contractor desired to be heard had to be stated, and this was done in a general way, and a request made for an opportunity to present the evidence in support of the contractor's contention. This contention being;

> "1. Because the difference in cost between excavating and depositing material shown by the borings, and the excavation and depositing of clay, bolders, and other hard materials actually found, is so materially different and excessive in cost as to be inequitable and unjust, and to require the excavation and disposal of a mass of material not within the terms of the specification * * *.
>
> "2. The bid of this company was justifiably based upon erroneous information and data furnished by the Engineering Department." (R. p. 22.)

The Court had much difficulty in overcoming the evidence which was adduced at the trial in support of the contractor's contention. In the course of its labors the court shows that at least $135,000 had been spent in repairs to the plant (Finding VI, R. p. 21), and that at the time of the suspension and when the application to be heard was made, "the plant had been gradually running down until at the time the work stopped it was inadequate to perform the contract." (Finding VIII, R. p. 22). In its opinion the Court says:

> "The borings in this stretch of 2.2 miles show 'mud, mud and sand, mud and shells, sand and gravel,' and yet the ten-day reports exhibit a strata of clay along the entire area. Clay is shown along with the the above materials, in some instances hard enough

to put the pumps of the plaintiff out of commission." (R. p. 29.)

It will be noted that the court here says that the borings in this stretch of 2.2 miles show mud, mud and sand, mud and shells, and sand and gravel; and on R. p. 27, the Court quotes from the specifications as follows:

> "*Character of material.* The material to be excavated is believed to be mud, sand and gravel. * * *."

Further on the Court, in its opinion, says:

> "And yet the ten-day reports exhibit a strata of clay along the entire area. Clay is shown along with the above materials in some instances hard enough to put the pumps of plaintiff out of commission." (R. p. 29.)

These ten-day reports were made by defendant's engineer showing the character and the amount of material as the dredging was done.

Under these circumstances the contractor temporarily suspended work shortly before the beginning of the three months during which it was exempt by the terms of the contract from work at all.

Now let us see what happened. The contractor without having an opportunity to be heard, was, some time before the expiration of the exempt period, directed by the engineer in charge of the work to "resume dredging at the earliest possible date." (R. p. 23.)

A few days thereafter, the engineer in charge asked for a reply to this communication, to which the Treasurer of the plaintiff replied:

> "We respectfully refer you to our previous correspondence on this subject, wherein we have informed you of our intention to discontinue work on this contract for reasons therein specified." (R. p. 23)

This prior communication was the above application to the Secretary of War to be heard. Thereupon, and on

March 4, 1913, the engineer in charge referred the matter to the Chief of Engineers, and enclosed copies of his above letters of February 8th and 21st, 1913, to the Contractor but significantly omitted this letter of February 28, 1913, from Contractor's treasurer and said:

> "3. In view of the information now received from the company, advice is requested as to the propriety of annulling this contract at this time." (R. p. 24.)

In this communication the engineer in charge further stated:

> "It appears from paragraph 4 of the department letter above referred to, that the contractor will not be in default until July 29, 1913, if the required rate of work, 50,000 cubic yards per month, is used as the required amount of work to be accomplished up to that date." (R. p. 24.)

On March 14, 1913, the engineer in charge wrote plaintiff:

> "Sirs: Referring to your letter of February 28, 1913, in which you have definitely informed me that you have discontinued work on your contract * * * I have to inform you that this contract * * * is hereby annulled with the sanction of the Chief of Engineers." (Finding IX, R. p. 24.)

Could there be anything more arbitrary? According to the decision of the Court, the contractor, after having had its plant put out of commission through dredging materials not provided for in the specifications or shown in the borings made application to the Secretary of War to be heard on the question and without ever having been given an opportunity to be heard, the contractor, during the exempt period, is directed to begin work at once. In a short time thereafter it is asked for a reply to this communication; to which contractor's treasurer replies that the contractor

had not changed its intention to discontinue work, as appears in its application to be heard, which latter shows on its face that only a temporary discontinuance is contemplated. Without further explanation from the contractor, this announcement, that there had been no change in the contractor's attitude from that expressed in its application to be heard, the cotnract is on March 14, 1913, summarily annulled, although the Department had itself found that "The contractor will not be in default until July 29, 1913." (R. p. 24.)

Does not this action violate one of the most fundamental and sacred principles of Anglo-Saxon jurisprudence, that one accused of wrongdoing ought not to be condemned without having been given an opportunity to be heard? It would be no more flagrant violation of this principle if one who had been charged with criminal wrongdoing should be tried and condemned without having been given an opportunity to be heard, than was done in the instant case.

It is significant that the defendant made no complaint or protest about the rate of progress or any so-called default until some time after the contractor had charged, on November 1, 1912, in its application to the Secretary of War to be heard, that it had been misled by the misrepresentations made through the office of the engineer in charge as to the character of the material to be dredged. The contractor having been guilty of *lese majesty* in making this charge, from this time on as the record shows the engineer in charge took every advantage of the slightest pretext to get the contract annulled without the contractor having had an opportunity to be heard on this charge regarding the misrepresentation made through the office of the engineer as to the character of the material. This was worked so cleverly the Court was misled into omitting all reference to the evidence which showed that after the temporary discontinuance of the work by the contractor on September 24, 1912, the plant was being repaired to resume work, and and was further misled into making the very inconsistent statement in Finding VII (R. p. 21), that:

> "After January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24, 1912."

Yet the Court shows that more than one and one-half years after this date of January 1, 1910, namely, on August 10, 1911, the defendant entered into a supplemental contract with the contractor to widen the channel provided for in the first contract.

In this supplemental contract of August 10, 1911, this significant language is used:

> "And whereas it is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified, for the following reasons." (R. p. 15.)

From this it would seem that the defendant did not at that time, at least, take very seriously this so-called default nearly every month, as expressed by the court at record, page 21.

RENUNCIATION MUST AMOUNT TO A CLEAR AND DISTINCT REPUDIATION.

The principle is well settled that the renunciation must amount to a clear and distinct repudiation of the obligations under the contract. There must be a positive declaration of a fixed purpose not to perform the contract. (Elliott on Contracts, Sec. 2032, Vol. 3, p. 11.)

This Court, in Dingley v. Oler, 117 U. S., 503, said:

> "In Smoot's case, 15 Wall. 36, this court quoted with approval the qualifications stated by Benjamin on Sales: 'Mere assertion that the party will be unable or refuse to perform the contract is not sufficient. It must be a distinct, unequivocal, absolute refusal to perform the promise, and must be treated and acted upon as such by the other party.' "

The Court cites with approval the case of Avery v. Bowden, the facts of which are given in the Smoot case, 15 Wall. 36, as follows:

> "Avery v. Bowden, in the Court of the Exchequer, affirmed in the Exchequer Chamber, is very much to the point. It was an action arising out of a charter party, one of the covenants in which was that the vessel should be at Odessa, and lay there forty days within which time the shipper was to furnish her cargo, unless war should soon be declared between Russia and Great Britain. The vessel came to Odessa on the 11th of March, and sailed away in ballast on the 17th of April. It was proved that at four different times during this period the officers of the ship applied to the charterer for cargo, who said, 'We have none for you,' and at last said,' 'I have no cargo for you; you had better go away.'
>
> "On this testimony a verdict was taken for the plaintiff, the shipowner, subject to the judgment of the court on the law of the case. The judges both in the Exchequer Court and in the Exchequer Chamber, were unanimous in the opinion that this conduct of the agent did not relieve the plaintiff from the obligation to remain the forty days, and that on that account he could not recover."

This is a sound rule, and should not be departed from. If it is departed from, it will inevitably lead to great confusion.

The Court will note that in all cases where a contract is held to be breached before performance, due through a renunciation of the obligations thereof, it has not only been held that such renunciation must be in unequivocal words —that is to say, words which are plain and without doubtful meaning—but also that the other party must accept the words as being the final expression on the subject, for if he afterwards requests performance, then such party does not consider the contract to be at an end, and there is no anticipatory breach thereof.

In the instant case, the last word of the contractor claimed by defendant to indicate the contractor's invention to repudiate the contract is found in the letter of November 1, 1912, in which there is a request for a termination. We find the defendant inquired twice many months thereafter, namely in February, of the contractor when operations would be commenced, and in one on February 8, 1913, said:

> "Please advise me of your plans and the date for resuming work, so that the necessary arrangements for inspection by this office may be made." (R. p. 23.)

It is very plain, therefore, that the defendant did not consider the letter of November 1, 1912, as a renunciation of the contract on the part of the contractor and did not treat it as a renunciation. So, then, if the letter of November 1, 1912, was not a renunciation of the contract, the letter of February 28, 1913, could not constitute a renunciation thereof, for the reason that it was intended merely to refer to the letter of November 1, 1912, and contained no statement relative to the intention of the contractor changing or modifying the attitude of the contractor as expressed in the letter of November 1, 1912.

IV.

INCONSISTENCIES IN THE COURT'S FINDINGS AND OPINION.

Implicit reliance is placed in the fact that this Court will sustain the contention that the lower Court erred as above pointed out. However, it may be interesting to note some of the inconsistencies contained in the lower Court's findings of fact and opinion, which should of themselves be sufficient reason for reversal.

This Court has held that in order to entitle the defendant to keep the retained percentages, it is incumbent upon it to show that the uncompleted work was done by another

contractor under a CONTRACT and specifications which did not materially or substantially depart from the old CONTRACT and specifications. (Axman's case, 234 U. S., 36; 58 L. ed., 1198; O'Brien's case, 220 U. S., 321.)

Thus it is well settled that the defendant's defense to the payment of retained percentages is an affirmative one.

In the instant case, the defendant never showed that the uncompleted part of the work was done by another contractor under a CONTRACT and specifications which did not materially and substantially depart from the old CONTRACT and specifications, and the defendant never seriously attempted to show this, for the very palpable reason that it could not.

The record at page 17 shows that,

> "No demurrer, plea, answer, counterclaim, setoff, claim of damages, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by rule 34."

Furthermore, the record is MOST SIGNIFICANTLY DEFICIENT of any copy of any contract and specifications under which the uncompleted work was done by another contractor, although copies of the contractor's contract and specifications are given in full. As explanation of this it should be stated that the contractor's counsel, when taking testimony, disclosed that the new contract and specifications with Breyman which had been incidentally claimed in a general way covered the uncompleted work, were in existence, and in Defendant's possession. The contractor's counsel then made a number of efforts to have copies of this contract and specifications introduced in evidence for the purpose of comparison, and as the best evidence on the question, to which defendant's counsel strenuously objected, with success.

UNCOMPLETED WORK NOT SHOWN TO HAVE BEEN COMPLETED UNDER CONTRACT WHICH DID NOT MATERIALLY DEPART FROM THE OLD CONTRACT.

The Court not only erred in not holding that it was incumbent upon the defendant to show that the work was completed under a contract which did not materially or substantially depart from the old contract, but the record utterly fails to show that the work was completed under a CONTRACT which did not materially depart from the old CONTRACT.

It is true that the Court, in Findling XI, R. p. 25, said:

> "After the work was abandoned by the plaintiff and the two contracts cancelled as described in Finding IX, the uncompleted part of the work was advertised August 16, 1913, on the same SPECIFICATIONS, SURVEYS AND BORINGS, and was awarded to Eugene Breyman at 26 7/8c per cubic yard, scow measurement, contract dated August 10, 1913, who completed the work." (Emphasis ours.)

It will be observed that the Court said that,

> "The uncompleted part of the work was advertised August 10, 1913, on the same SPECIFICATIONS, SURVEYS AND BORINGS, and awarded to Eugene Breyman." (Emphasis ours.)

Not once does it say that the work was awarded or completed under a CONTRACT which was the same or did not materially or substantially depart from the old contract. It is one thing to advertise on the same specifications, surveys and borings, and an entirely different thing to enter into a contract upon the same terms as the old contract.

It is significant that the Court omits saying the all essential and vital thing that the CONTRACT under which the work was awarded and completed, was the same, or even similar to the old contract, and that there was no ma-

terial or substantial difference between the two. The reason for this is very simple, it being that there was no evidence in the record upon which the Court could base any such finding or any such statement in its opinion.

This is further shown by the figures given by the Court in its Findings.

Finding II, R. p. 18, shows that the contractor's contracts called for dredging the following amounts:

Original contract	4,177,110	cu. yds.
Supplemental contract, 10%	417,711	cu. yds.
Making a total requirement of	4,594,821	cu. yds.
Finding VII, R. p. 22, Shows that contractor dredged under the two contracts	3,153,632	cu. yds.
Leaving a balance to be dredged of	1,441,189	cu. yds.
Finding XI, R. p. 25, shows that Breyman dredged a total of	1,328,257	cu. yds.
Making a difference of	112,932	cu. yds.

which itself shows a material variation.

Furthermore, the Court does not say to what "The same specifications, etc.," refers. A careful reading of this finding will disclose that the particular thing the court had in mind in this finding was to show how much had been dredged by the new contractor, and what the defendant lost by not having been able to get the work completed at the price the contractor had received. In the first sentence, the finding states that the work had been let to a new contractor, and gives the price; and in the next sentence it gives the amount the new contractor dredged, and the cost thereof to the defendant, and what it would have cost if the contractor had completed its contract, and the difference in cost of $141,127.31.

The Court says:

> "After the contract was abandoned by the plaintiff and the two contracts cancelled as described in Finding IX the uncompleted part of the work was adveritsed August 16, 1913, on the same specifications, surveys and borings." (R. p. 25.)

To what does "specifications, etc.," refer? Does it refer to the first contract, or to the second? It could not have referred to both contracts, as their specifications were different, and were for dredging different areas.

If the court had been attempting to apply the rule announced by this Court, that the Government must show that the work was done by another contractor under a contract and specifications which did not materially differ or substantially depart from the old contract and specifications (Axman's case, 234 U. S., 36), it certainly would have used more definite and specific language.

This would seem clear when considered in connection with the very material variance between the work to be done under the old contract and the work shown by the findings to have been done under the new contract.

Finally, where does the court get its authority for stating that the uncompleted part of the work was advertised August 16, 1913, on the same specifications, surveys and borings? (Finding XI, R. p. 25.)

When the contract was annulled there remained a certain, definite number of cubic yards to be dredged. An examination of the specifications for the Breyman contract will show that they nowhere provided for any definite number of yards to be dredged, but provide that the quantity of material to be removed under the contract will depend upon the price bid.

COURT MISLEAD REGARDING THE LOCATION OF THE DUMPING PLCE AS AFFECTING THE CONTRACTOR'S REASONS FOR DISCONTINUING WORK.

After stating in its opinion that the work had been done in a most expeditious manner up to the time of the discontinuance (R. p. 29), the court says:

> "It was not until the plaintiff company had completed fully, or very nearly so, two-thirds of the work, that complaint was made, over five years after it had begun work, and at a time when it became more expensive to operate because so far from a dumping base."

The Court was misled on this question of the distance from the dumping base, but lays great stress on it as being the real reason for the contractor's discontinuing the work.

That the Court was decidedly misled is disclosed by the record. The area to be dredged was 10.8 miles long (contract, R. p. 10). The contractor began dredging at the lower end of the work and progressed upstream (Finding VII, R. p. 21) and completed the dredging for the full width for a distance of 6.3 miles, 5.3 miles being on the part shown on sheets one and two, and one mile being on the part shown on sheet No. 3 (R. p. 21). The contractor then proceeded dredging on up the Passaic River for a distance of 2.2 miles additional at about half of the required width. (R. p. 21.) Thus the contractor had dredged for a distance of 8.5 miles out of the required 10.8 miles. So it appears that the distance from the dumping base for the uncompleted part was not very material.

This finding VII (R. p. 21) does most conclusively bear out the contractor's contention that as the dredging progressed up the Passaic River, the proportion of the hard material very greatly increased, thus making the material much more difficult to pump. Furthermore it is a matter of common knowledge that the proportion of rock, clay and other

hard materials almost invariably increases in proceeding upstream from the mouth, as in this instance.

THE COURT WAS GREATLY IMPRESSED WITH THE ENORMOUS INCREASE IN THE VALUE OF THE LAND AS A RESULT OF FILLING IN AND OF THE WAR.

In Finding X, R. p. 24, the Court makes a very remarkable statement, as follows:

> "The distance plaintiff would have been compelled to transport this material to sea if it had not had the dumping ground on ITS OWN PROPERTY, the Newark Meadows * * *. The evidence does not show how much of PLAINTIFF'S SWAMP LAND was filled in by this contract, but does indicate that a considerable part of the 3,500 acres was thus reclaimed. * * * The value of the land after filling in was increased $12,000 per acre over its value prior thereto, or a total increase for the 3,500 acres of $42,000,000." (R. pp. 24-5.) (Emphasis ours.)

That this finding containing the very immaterial statement regarding the increase in the price of the land upon which the material was dumped should have been without preceding or subsequent connection, thrown in, among the other findings, and containing another statement which is flatly contradicted by another finding, is astonishing.

At the top of page 29 of the record, the court in its opinion, said:

> "As a matter of fact, proven and not seriously disputed, the enterprise as a whole resulted in immense profits, as shown in Finding X, notwithstanding the dredging contract was performed to the date of abandonment at a serious loss. * * * It is a most potent factor in the determination of the issue as to being misled by the representations of the Government."

It is true that the plaintiff offered no evidence to dispute this immaterial fact that the price of the land upon which

the material was dumped was greatly increased by the dumping, and the World War, to which the Court refers in another part of its opinion, as it was thought that the increase in the price of land and the effects of the World War were wholly immaterial to the determination of this issue. Yet it seems the court considered it to be "a most potent factor."

If such matters were to be gone into, it could have been shown that the bids, other than the contractor's, for doing the entire work ran "from 22.2c to 36.44c per cubic yard" (Finding V, R. p. 20), making a difference between the lowest bid and what the contractor received for doing the work of 5.95c per cubic yard, or a saving to the defendant on the work done by the contractor of $187,641.10, but with the result that the contractor's magnificent plant had been put out of commission, in dredging material not provided for in the specifications (Finding VII, R. p. 22, and opinion, R. p. 29), and according to the Court's finding (R. p. 22) sold for $1,000.00, and that $135,000.00 had been spent "on repairs to the dredging plant." (R. p. 21.)

THE EFFECT OF THE INCREASE IN THE VALUE OF THE LAND UPON THE COURT'S FINDING AND OPINION SHOWN IN THE CONFUSION REGARDING THE OWNERSHIP OF THE LAND AND THE CONTRADICTORY STATEMENTS IN THE FINDINGS AND OPINION CONCERNING THIS OWNERSHIP.

As indicating something of the inconsistencies of the findings and opinion in this case, the Court's attention is invited to the statement of the lower Court in the disconnected Finding X, R. p. 24, as follows:

> "The distance plaintiff would have been compelled to transport this material to sea if it had not had the dumping ground on ITS OWN PROPERTY, the Newark Meadows * * *. The evidence does not show how

much of PLAINTIFF'S SWAMP LAND was filled in by this contract, but does indicate that a considerable part of the 3,500 acres was thus reclaimed. * * * The value of the land after filling in was increased $12,000 per acre over its value prior thereto or a total increase for the 3,500 acres of $42,000,000." (R. pp. 24-5.) (Emphasis ours.)

It will be observed that all through this Finding X (R. p. 24), the Court refers to this so-called $42,000,000 worth of property as being the contractor's "*own property.*" Yet in Finding VI, R. p. 21, the Court said:

"Finally, Harvey Fisk & Sons foreclosed its lien on the dredging plant and Newark meadows and bought in the whole property. They then separated the land from the dredging operations and formed two companies, the Newark Meadows Improvement Company and the Midland Land and Improvement Company, and John A. Seeley became manager of the dredging Company." (R. p. 21.)

Still in another finding (VIII, R. p. 22) the Court said:

"Several months prior to that date (September 24, 1912), all of the stock in the dredging plant, including the retained percentage, was sold to one Frank A. Barnaby for one thousand dollars. The work continued, however, until September 24, 1912, in the name of said company under the management of John A. Seeley." (R. p. 22.)

And in another finding (XII, R. p. 25) the Court said:

"The charter of the company was forfeited for nonpayment of taxes."

A rather absurd situation for a corporation which the Court in another finding said owned property valued at $42,000,000.

So it appears from a careful examination of the findings and opinion of the Court that in order to support one theory the findings show that there were two separate and distinct companies or legal entities, to which it was referring, and that these two companies owned separate and distinct properties—one the land which was being filled in, and the other the dredging plant; and in support of another theory that the contractor owned all of the property of the two companies, including the dredging plant and the $42,000,000 worth of real estate besides; and in support of another theory that the contractor was a pauper, having sold all of its stock for $1,000.00, and having had its charter forfeited for non-payment of taxes.

It is most unfortunate that this Court could not have the evidence before it upon which these conflicting statements are based.

It is respectfully submitted that an explanation of these inconsistencies may be found in the fact that the Court was very much overworked and quite tired at the time these findings and this opinion were written.

CONCLUSION.

FIRST: It is respectfully submitted that the Court erred in holding that the contractor was in default in the performance of the contracts.

SECOND: It is submitted that the Court erred in holding that the contractor repudiated its obligations under said contracts, thereby creating an anticipatory breach thereof.

THIRD: It is submitted that the Court erred in not holding that it was incumbent upon the defendant to show that the uncompleted part of the work had been completed under a contract and specifications which did not materially or substantially depart from the old contract, and in not holding that defendant had failed to show that the uncompleted part of the work had been so completed.

FOURTH: It is submitted that the Court erred in its failure to award a judgment in favor of the contractor in the sum of $33,998.17, and in dismissing the petition.

C. C. CALHOUN,
Attorney for Appellant.

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IN THE

Supreme Court of the United States

October Term, 1925.

No. 105.

MIDLAND LAND AND IMPROVEMENT, COMPANY, *Appellant*,
vs.
THE UNITED STATES, *Appellee*.

REPLY BRIEF FOR THE CONTRACTOR, THE APPELLANT.

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IN THE

Supreme Court of the United States

October Term, 1925.

No. 105.

MIDLAND LAND AND IMPROVEMENT, COMPANY, *Appellant*,
vs.
THE UNITED STATES, *Appellee*.

REPLY BRIEF FOR THE CONTRACTOR, THE APPELLANT.

OPINION BELOW.

The opinion of the Court of Claims (R. 26)) is reported in 58 Ct. Cls. 671.

JURISDICTION.

The judgment appealed from was entered on April 2, 1923, (R. 31). A motion for a new trial was made June 1, 1923 and denied February 18, 1924, (R. 31). Appeal was taken May 15, 1924 (R. 31), under Section 242 of the Judicial Code (later repealed by the Act of February 13, 1925, Chap. 229, 43 Stat. 936, 939.)

It is respectfully submitted that the defendant's reply brief contains some statements which, if left unexplained, might be misleading. To point this out, and for the convenience of the court, the following reply brief is submitted on behalf of the appellant—the contractor.

THE QUESTIONS.

In stating "the questions" it appears that the defendant's brief (p. 2) does not clearly set forth all of the questions involved in the case. These questions are:

FIRST: THAT THE CONTRACT WAS WRONGFULLY ANNULLED.

SECOND: THAT IT WAS INCUMBENT UPON THE DEFENDANT TO SHOW THAT THE INCOMPLETED WORK WAS DONE UNDER A CONTRACT AND SPECIFICATIONS WHICH DID NOT MATERIALLY DEPART FROM THE ANNULLED CONTRACT AND THAT THE DEFENDANT HAS FAILED TO SHOW THIS.

ARGUMENT.

MATERIALS TO BE DREDGED, AND THOSE ACTUALLY DREDGED.

The defendant's brief devotes many pages in an attempt to show that the contractor had not been misled by the representations of the defendant as to the character of the materials to be dredged. As no claim is made by the contractor for damages for such misrepresentations, this is immaterial except as it might have

affected the contractor's plant and consequently required temporary suspension of the work for repairs.

That there was misrepresentations as to the materials supposed to be dredged and those actually dredged, there can be no question. Both the findings and the defendant's brief show this. On page 3 defendant's brief in quoting from the specifications as given in the findings, (R. 18-19) says:

> "The material to be excavated is believed to be mud, sand and gravel."

And on page 8 defendant's brief, in commenting on the good progress the contractor had made during the first four years of the work again quotes from the findings (R-21-22) which in referring to the plant, says:

> "It could and *did pump clay and cobble stones* in its hydraulic dredges, *and where stone was dredged* plaintiff was paid for dredging and at special prices." (Emphasis ours.)

And the court in its opinion says:

> "The borings in this stretch of 2.2 miles show mud, mud and sand, mud and shells, sand and gravel, and yet the ten-day reports *exhibit a strata of clay along the entire area. Clay is shown along with the above materials in some instances hard enough to put the pumps of the plaintiff out of commission.*" (R-28) (Emphasis ours).

THE CONTRACTOR'S KNOWLEDGE OF THE MATERIAL TO BE DREDGED.

Defendant's brief lays great stress upon the knowledge which the contractor is charged with possessing

of the character of the materials to be dredged. Much emphasis—the words even being emphasized, is put upon the statement which, according to common knowledge, the defendant puts in its printed form of proposal, and which it requires the contractors to sign, which statement is as follows:

> "We make this proposal with full knowledge of the kind, quantity and quality of the work required." (Deft's Brief, p. 5.)

Yes, knowledge "of the work required," but this is quite different from saying that the contractor has full knowledge of the character of material in a stratum of earth 4 feet thick and beneath 12 feet of water.

The contract provided for deepening the channel from 12 feet to 16 feet.

And, again, the brief refers with great satisfaction to the Court's remarkable finding (R-19) to the effect that because the contractor had dredged to a depth of 12 feet over the principal part of this channel, he must perforce and necessarily be thoroughly familiar with the character of the material between the limits of 12 and 16 feet below 12 feet of water.

Such contentions only go to show to what desperate lengths the defendant is driven in the loyal support of a poor case.

DEFENDANT'S BRIEF SAYS THAT:

> "Complete cessation of work by the appellant was a breach of the contract."

In order to support this contention, defendant's brief (p. 20) says:

"The contract in this case, among other things, provided (R-19) that:

> 'The required rate of work will be at least 50,000 cubic yards per month, unless otherwise authorized by the engineer. If at any time after the date fixed for the beginning of the work it shall be found that operations are not being carried on as rapidly *as required by the contract*, the engineer shall have power'

to proceed to procure other means of having the work performed. It was also provided that:

> '*No work will be required in the months of December, January, and February,* but it may be continued in these months if the contractor so desires. (R-19).' "

From this it appears that the inference is sought to be drawn that the engineer had authority under this provision to annul the contract; whereas, if the entire provision were quoted it would be found that it provides for the defendant to put extra forces on the work to COMPLETE IT ON TIME.

Furthermore, from this it is argued in defendant's brief that the contract required that a minimum of 50,000 cubic yards be dredged for each dredging month; whereas, it is perfectly plain from this entire provision, that what the contract actually provided for was that the work should be carried on at the average rate of 50,000 cubic yards per month, so as "to insure the *proper completion of the work within the time specified.*" (Emphasis ours.)

The part omitted from the defendant's brief, including the last five words of the part quoted is as follows:

> "The engineer shall have power, after due notice in writing to the contractor, to employ such additional plant or labor, or to purchase such material as may be necessary *to insure the proper completion of the work within the time specified.*" (R-11) (Emphasis ours)
>
> This the Engineer never did.

The time specified is easily arrived at by dividing the number of cubic yards the contractor agreed to dredge, viz; 4,177,110 cubic yards (R. 3) by 50,000 cubic yards per month for the nine dredging months per year. The contract contemplated a certain definite time for the completion of the work, and required dredging at a certain rate in order to insure the "proper completion" by that time. It was considered that the average rate of 50,000 cubic yards per month for nine months out of the year would accomplish this.

But the defendant's brief says:

> "The Government submits that all these provisions taken together require the contractor to excavate at least 50,000 cubic yards during each and every working month, and not, as appellant contends, to excavate an average of 50,000 cubic yards per month." (Deft's Brief, p. 21.)

One of the provisions of the contract itself clearly shows that all that was contemplated by the contract was an average rate of 50,000 cubic yards per month for the nine dredging months, and that the contractor would not be in default when dredging less than 50,000 cubic yards during any one or more months if this average of 50,000 cubic yards per month were maintained, as shown by the following provision of the specification:

"16. Payments for accepted work will be made monthly for material excavated and deposited, *and not previously paid for,* subject to the condition that no payment, *except the final one,* will be made for the excavation and deposit of *a quantity less than 50,000 cubic yards,* scow measurement, unless in the opinion of the Engineer the work has been unavoidably delayed by bad weather or unless a less quantity has been required by the Engineer in charge to be removed during the calender month next preceding the month of payment." (R. 8) (Emphasis ours.)

That the defendant's eengineers in charge of the work understood these provisions of the contract and sspecifications to be as contended for by the Contractor and *not* as contended for by the defendant is clearly shown by the following statement from the engineer in charge, as appears in the Findings of the Court:

"It appears from paragraph 4 of the Department letter above referred to, that the contractor will not be in default until July 29, 1913, if the required rate of work, 50,000 cubic yards per month, is used as the required amount of work to be accomplished up to that date. (R. 24)

In further support of defendant's theory that the contractor was required to dredge at least 50,000 cubic yards for each dredging month, the defendant's brief seems to put great reliance in a statement made in one of the findings of the court when referring to the period between January 1st, 1910 and September 24, 1912, which says that "in every month except three, plaintiff was in default in its monthly dredging work" (R. 22).

If this statement means that the contractor was in

default in dredging 50,000 cubic yards for each one of the dredging months during this time, that is, that if it had failed to dredge the full 50,000 cubic yards each month, it is correct, but if it means that the contractor had defaulted *in the performance of its contract* by not having dredged 50,000 cubic yards each month during the time, then it is not correct. However even if the Court of Claims had held the latter, it would be subject to review by this Court.

The contention of defendant's brief is predicated entirely upon the statement made in Finding VII (R. 21) of the Court which says:

> "After January 1st, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24, 1912. During eight months in which work was required, no work was done and in every month except three plaintiff was in default in its monthly dredging work and in June, July, August, and September, 1912, it dredged 31,926 cubic yards instead of the minimum required by the contract, 200,000 cubic yards." (R. 21-22)

Now let us see how inconsistent this contention is. The Court says that "After January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24, 1912." (R. 21)

During this period, including September, there are twenty-five dredging months. It will be noted that in commenting upon the work done during this period between January 1, 1910, and September 24, 1912, the Court says no dredging whatever was done during eight months in which work was required. The Court further says that during the four months of June, July,

August and September of 1912, the contractor dredged less than the required 50,000 cubic yards per month and says nothing about the remaining three months of March, April and May. Therefore, it is a justified conclusion to assume that the full 50,000 cubic yards per month were dredged in each of these three remaining months, as it was evidently the Court's purpose to show that the contractor had been in default in dredging 50,000 cubic yards per month during this period. Counting the dredging months of 1912, we have seven of the above twenty-five dredging months accounted for, leaving a balance of eighteen dredging months in 1910 and 1911 to be accounted for. It would be fair to assume that these eight months in which no dredging whatever was done were equally divided during the two years of 1910 and 1911, particularly in view of the emphasis which the Court lays upon the so-called default of the contractor, beginning with January 1, 1910. This gives four months in 1910 in which no dredging whatever was done and it is only fair to assume that to the middle of August, 1911, there were some months in which no dredging was done during the five and a half months of that period so that it would be fair to assume that at least half of these four months in 1911, in which no dredging was done fell in the period between March 1st and the middle of August, 1911, thus giving at least six months between January 1, 1910, and August 14, 1911, in which no dredging whatever was done.

This is in accordance with the ten-day reports prepared by the defendant's engineers which show the progress of the work and to which the Court referred when it said:

> "and yet the ten-day reports exhibit strata of clay along the entire area. Clay is shown along with the above materials, in some instances hard enough to put the pumps of the plaintiff out of commission." (R. 29).

The same ten-day reports also contain the following data:

> "January 3, 1910. 1. Note: 'The cutter is broken off and the suction pipe and the pump choked up with rock, causing most of the delays.' "

This last statement is not, of course, referred to by the Court, although it is a part of the ten-day reports which show the progress of the work during the eight months in which no dredging was done as shown, by the Court and although the Court says in Finding VII:

> "that after January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24, 1912." (R. 21)

Now on August 14, 1911, the defendant solicited the contractor to enter into a supplemental agreement for the purpose of widening certain parts of the channel covered by the original contract and, mark you, in this supplemental agreement entered into August 14, 1911, after referring to the original contract, the following very pertinent language is used:

> "And whereas, *it is found advantageous* and in the best interest of the United States to modify the said contract as hereinafter specified, for the following reasons:
>
> "That since the said contract was entered into requests have been made upon the United States

by interested parties for the removal of a shoal in the Passaic River on the south side of the present lines of the work now being done under said contract. * * *

"Now, therefore, the said contract is, on this 3d day of August, 1911, hereby modified in the following particulars, but in no others.

"That the said contractor, Midland Land & Improvement Company, shall do the additional dredging required to widen the channel in the Passaic River on the south side of the present lines of the work now being done under said contract in the vicinity of the Listers Chemical Works. * * *

"Approved August 14, 1911, John C. Scofield, Assistant and Chief Clerk for the Secretary of War in his absence." (R. 15-16)

Thus we find that this supplemental agreement, approved August 14, 1911, is a complete answer to the contention in defendant's brief that the contract required that 50,000 cubic yards be dredged each dredging month; for this supplemental agreement shows conclusively that during this period between January 1, 1910, and August 14, 1911, of "spasmodic dredging," and the so-called default in the amount to be dredged each month, that the defendant's representatives, who negotiated the contract and who had charge of its execution, gave no such interpretation to it as is now contended for in defendant's brief, but gave it the same interpretation which the contractor then understood and now contends for.

It is respectfully submitted that the defendant is estopped from now setting up this defense after having given the stamp of its approval to the progress of the work notwithstanding there had been some so-called default in the monthly dredging, and after having lulled the contractor into a perfect state of security

on this point by entering into the supplemental agreement, because, as stated therein, it was found "advantageous" and "in the best interest of the United States" to have this contractor increase, by 10 per cent, the amount of dredging it had agreed to do.

The defendant's brief seems to rely upon the case of the United States vs. McMullen (222 U. S. 460), in support of its contention that the failure of the new contract with Breyman to provide for the removal of all the material that remained from the annulled contracts was not fatal to the defendant's right to the retained percentages. At the outset the court will observe that the facts in the McMullen case were vastly different from the facts in the instant case. Among them being that in the former the amount of yardage to be dredged depended upon appropriations therefor. This, as a matter of course, left the amount of work to be performed uncertain of determination. In the instant case, however, there was no uncertainty as to the scope of the work, the exact number of cubic yards to be dredged under the original contract were specifically set out and when the second contract was let for a part only of the work called for, the defendant destroyed its means of determining liability.

The defendant's brief says:

> "The above decision (McMullen v. U. S.) is discussed and approved in U. S. v. Axman, 234 U. S. 37."

This is true, and in the Axman case the distinction is clearly pointed out between that case and the McMullen case. It is respectfully submitted that the principle applied in the Axman case is correct and is perfectly

applicable to the instant case, while the principle announced in the McMullen case is not at all applicable.

In distinguishing between the two cases, this Court said, at page 44:

> "We thus observe that in the McMullen case it was found that the liberty given to the second contractor to dump in deep water did not change the contract, because in the first contract the government reserved an absolute right of choice in this regard. In the present case there was no such right of choice. The place of dumping spoil was made, as we have said, a specific requirement of the contract."

It will be observed that in the Axman case the only difference between the first and the second contract, was a change in the place of dumping the spoil, this being more advantageous under the second contract.

At page 43, this Court said:

> "The government insists that the main purpose of the original contract was to secure the dredging of the channel, and that the place of dumping the spoil was but incidental."

And further, at page 45, this Court said:

> "In the McMullen case, in treating of the right reserved in the first contract giving the government an absolute choice of the dumping ground, it was concluded, 'whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform.' We are clearly of the opinion in this case that the work done under the second contract was not the work which the first contractor had agreed to perform. While it

> is true it accomplished the dredging of the channel in the same bay, it did this with a disposition of the spoil not permitted under the first contract, and in a material matter was different from the contract first entered upon."

So in the instant case, while the dredging done under the second contract was in the same channel, it was for a different yardage than provided for in the first contract. And there can be no doubt but that the areas to be dredged under the two contracts were different. As shown in the contractor's original brief, page 25 there was a difference of 112,932 cubic yards between the amount remaining to be dredged under the original contracts and that actually dredged by Breymann under the new contract. If there could be a variation of more than a hundred thousand cubic yards in the amount of dredging to be done under the second contract, there is no limit in principle to which this variation might be carried. If, as held in the Axman case, a difference in the place of dumping the spoil constituted a material variance in the contracts, surely a difference in the area, amounting to 112,932 cubic yards to be dredged under the annulled and the new contracts, in the instant case, would constitute a greater variance between these two contracts, than there was in the Axman case.

It is true, as stated in defendant's brief at page 32, that the Court found that

> "the uncompleted part of the work"

covered by the two old contracts was relet, yet, as pointed out in the contractors original brief, at page 25, other findings show that there was a difference of 112,-

932 cubic yards in the area to be dredged under the annulled contracts and that actually dredged under the second. Furthermore, it is earnestly urged that nowhere in the Findings of Fact, or the opinion of the Court below is it shown or stated that the uncompleted part of the work was relet or done under a CONTRACT which did not materially depart from the first contracts. It is true that it is stated in the findings that the work was advertised under the same specifications, etc., but nowhere is it shown that the incompleted work was relet even under the same specifications, etc., as the annulled contracts.

CONCLUSION.

Therefore, it is respectfully submitted:

FIRST: That the contract was wrongfully annulled;

SECOND: That it has not been shown that the incompleted work was relet, or done under the same specifications and contract as the annulled contracts, as was encumbent upon the defendant to do;

THIRD: That the contractor is entitled to recover from the defendant the retained percentages, amounting to $33,998.17.

Respectfully submitted,

C. C. CALHOUN,
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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 105

MIDLAND LAND AND IMPROVEMENT COMPANY, appellant

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 26) is reported in 58 Ct. Cls. 671.

JURISDICTION

The judgment to be reviewed was entered on April 2, 1923. (R. 31.) A motion for a new trial was made June 1, 1923, and denied February 18, 1924. (R. 31.) Appeal was taken May 15, 1924 (R. 31), under Section 242 of the Judicial Code (later repealed by the Act of February 13, 1925, Chap. 229, 43 Stat. 936, 939).

THE QUESTION

The action was based upon a dredging contract between the plaintiff in error and the United States. The work was partly performed by the contractor, and for this he was paid the contract price, less a percentage retained as provided in the contract, to insure completion. The contractor then ceased work, and the United States treated the contract as broken and relet the work to another and applied the retained percentages owing to the contractor to cover the increased cost resulting from the reletting. In this action the claimant sought to recover the retained percentages of the contract price on the work performed by the claimant. *The main question in the case is whether the United States was justified in treating the contract as broken and reletting the work to another and applying the retained percentages to cover the resulting additional cost.*

STATEMENT

The facts as found by the Court of Claims are as follows:

The plaintiff, a New Jersey corporation (R. 18), on August 12, 1907, entered into a contract with the United States to dredge and dispose of 4,177,110 cubic yards of material in the Newark Bay and Passaic River for 16¼ cents per cubic yard. The work was to dredge a channel sixteen feet deep at mean low water from Staten Island Sound, through Newark Bay and the Passaic River to Montclair

and Greenwood Lake Railroad bridge, a distance of 10.8 miles, 300 feet wide, to the Nairn Linoleum Works, a distance of 9.7 miles, and thence 200 feet wide to the Montclair and Greenwood Lake Railroad, 1.1 miles (R. 18), such work to be prosecuted "with faithfulness and energy" (R. 18).

The specifications, among other things, provided that:

> A percentage of ten (10) per centum will be reserved from each payment until half of the work under the contract, as estimated by the engineer, has been completed, after which there shall be no further reservation. (R. 18.)

The specifications also contained a statement that:

> *The material to be excavated is believed to be mud, sand, and gravel, but bidders are expected to examine the work and decide for themselves as to its character and make their bids accordingly, as the United States will not guarantee the accuracy of this description. The price per cubic yard will cover the removal of all material encountered, except ledge rock.* (R. 18–19.)

Also that:

> The required rate of work will be at least 50,000 cubic yards per month, unless otherwise authorized by the engineer. If at any time after the date fixed for beginning the work it shall be found that operations are not being carried on as rapidly as required

> by the contract, the engineer shall have power, after due notice in writing to the contractor, to employ such additional plant or labor, or to purchase such material as may be necessary to insure the proper completion of the work within the time specified, and the excess cost thereof shall be a charge against any sum due or to become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract.

Also that:

> No work will be required in the months of December, January, and February, but it may be continued in these months if the contractor so desires. (R. 19.)

On August 3, 1911, the appellant entered into a supplemental contract with the Government to widen the channel opposite Lister's Chemical Works about 4,500 feet above the beginning of the channel in Newark Bay and at any bends of the Passaic River below the end of the channel at Montclair and Greenwood Railroad bridge, the amount of dredging not to exceed 10 per cent of the amount stated in the original contract and the contract to be governed by the same specifications as the first. (R. 19.)

The original and supplementary contract and specifications which are attached as an exhibit to the petition (R. 3–11) are made a part of the Findings by reference. (R. 19.)

The contract was made after an invitation for bids and receipt of sealed proposals. The appellant's proposal, dated June 30, 1907, stated:

> The manager of this plant has been engaged in this class of work for many years, i. e., Hudson River U. S. contract, 1900 to 1906, completed O. K.; Newark Bay and Passaic River, 1904 to 1906, completed O. K.; Great South Bay, 1904, completed O. K.; Patchogue River, 1906, completed O. K.; Staten Island Sound, 1906, completed O. K.; and at least 50 other contracts. *We make this proposal with full knowledge of the kind, quantity, and quality of the work required,* and if it is accepted will, after receiving written notice of such acceptance, enter into contract within the time designated. (R. 19.) (Italics ours.)

The manager referred to was John A. Seeley, who made the estimates for the plaintiff's bid, and he was familiar with the whole stretch of Newark Bay and Passaic River covered by plaintiff's contracts, his experience extending over a period of eleven years. He had been superintendent of a contract for dredging a 12-foot channel over the same course. (R. 19.)

Under the Act of March 3, 1905, Chap. 1482, 33 Stat. 1117, surveys and borings were made by the Engineer Office in October, November, and December, 1906, of the channel which this contract covered, with a view to deepening the channel from 12 to 16 feet and to determine the character of the material to be removed by dredging.

> The borings were made with a steel rod an inch and a half in diameter, and were driven into the bottom of bay and river by hand power, and the depth of the water and of each kind of material penetrated was recorded. This was the proper and customary way to make borings where the depths of the water and character of the bottom were such as was found in the channel proposed to be dredged. (R. 20.)

143 of such borings were made and recorded on three separate sheets. Sheet No. 1 covered 2.2 miles and borings 1 to 42, inclusive, and " indicate mud, mud and sand, mud and shells, sand and gravel." Sheet No. 2 covered 3.1 miles and borings 43 to 74, inclusive, " and indicate mud, mud and sand, sand, sand gravel and clay, gravel, and clay." Sheet No. 3 covered 5.5 miles and borings 75–143, inclusive, "and indicate mud, mud and sand, sand, sand and gravel, gravel, sand gravel and clay, and bottom bowlders." Gravel, as the term is used in hydrographic engineering, indicates material running from grit to stones 2 inches in diameter, and bowlder, a word used interchangeably with cobblestones, indicates stones from 2½ to 8 inches in diameter, rounded by the action of water in the glacial period. These borings were made by competent men in good faith and according to their best judgment and whenever they struck a bowlder the fact was recorded, the borings stopped at that place, and they went on to another place for another boring. The material afterwards dredged from the channel

corresponds generally to the material indicated by the borings. These sheets were furnished to prospective bidders. (R. 20.)

The estimate of cost by the Government engineers was 26 cents per cubic yard for the lower reaches of the channel and 32 cents per cubic yard for the upper reaches,

> the difference in estimates being due to the more difficult character of the material to be dredged, and the number of bridges in the upper part of the channel through the draws of which the scows would have to pass. (R. 20.)

Four other bids ranged from 22.2 cents to 36.4 cents per cubic yard. (R. 20.)

In 1905 a company was organized by New York interests and took over the dredging plant used in this contract, and about 3,500 acres of swamp land known as the Newark Meadows, the purpose being to dredge near-by waters and fill in the swamp property. Later, after considerable money had been put into the business, and taxes on the lands had been raised, all of the others, except Harvey Fisk and Sons, withdrew from the business and the Fisks foreclosed the liens which they had on the properties and bought them in. They then formed two companies, placing in one the reclaimed lands and in the other (the appellant herein) the dredging plant, and made John A. Seeley the manager of the plant. (R. 21.)

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Appellant began work under the contract on August 28, 1907, completely dredging the portions covered by boring sheets Nos. 1 and 2 a distance of 2.2 miles and 3.1 miles, respectively, dredging completely one mile of the distance covered by boring sheet No. 3, and dredged half or less than half of the width of the prescribed channel for 2.2 miles of the distance covered on sheet No. 3.

When plaintiff began the work, its plant was sufficient to have completed it in contract time and within two years had completed one-half of the work, and was paid on that basis, less the retaining 10 per cent, or $33,998.15. The plaintiff continued to make good time until the end of the year 1909 and was in excess of the minimum quantity of 50,000 cubic yards per month required by the contract.

> There was no material encountered which plaintiff's plant, before it was allowed to run down, could not handle. It could and did pump clay and cobblestones in its hydraulic dredges, and where stone was dredged plaintiff was paid for dredging them at special prices. After January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to Sept. 24, 1912. During eight months in which work was required no work was done, and in every month except three plaintiff was in default in its monthly dredging work; and in June, July, August, and September, 1912, it dredged 31,926 cubic

yards instead of the minimum required by the contract, 200,000 cubic yards. (R. 21–22.)

On September 24, 1912, appellant stopped work on the contract. The stock of the company had been previously sold for $1,000.

> The plant had been gradually running down until at the time the work stopped it was inadequate to perform the contract. (R. 22.)

On November 1, 1912, appellant wrote to the Secretary of War "requesting the cancellation of the two contracts," the letter stating that:

> We respectfully submit, in support of our position, that the contract should be terminated—
>
> 1. Because the difference in cost between excavating and depositing material shown by the borings, and the excavation and depositing of clay, bowlders, and other hard materials actually found, is so materially different and excessive in cost as to be inequitable and unjust, and to require the excavation and disposal of a mass of material not within the terms of the specifications at the price bid for the former imposes a burden upon the contractor that is inequitable and unjust.
>
> 2. The bid of this company was justifiably based upon erroneous information and data furnished by the Engineering Department.
>
> 3. For reasons given the contract should be discontinued and terminated, all percentages retained should be paid to the contrac-

tor, and this contractor released from all liability thereunder.

4. The work should be readvertised on correct information without prejudice to this contractor.

We respectfully request that we be given an opportunity to be heard in this matter and to submit, if you should deem it advisable, evidence to support the contentions urged above.

We further request that the United States Engineer Office at the city of New York be advised of this application; that a consideration thereof is pending in your office; and that pending this consideration no further action may be taken by him prejudicial to this contractor. (Rec. pp. 22–23.)

On February 8, 1913, the Engineers Office in charge of the work requested appellant to resume the dredging not later than March 1, 1913, and to prosecute the work with "faithfulness and energy" in accordance with the contract, stating that:

> the entire cessation of the work is not contemplated under the contract, although you have attained the required average of progress to date upon same. (R. 23.)

The engineer again wrote to appellant on February 21, 1913, requesting a reply to this question. (R. 23.) The appellant replied on February 28, 1913, stating that:

> We respectfully refer you to our previous correspondence on this subject *wherein we have informed you of our intention to dis-*

> *continue work on this contract for reasons therein specified.* Upon advice of our attorneys we have not changed our position in the matter. (R. 23.) (Italics ours.)

The Engineer's Office, stating "So far as the practical consideration of this contract is concerned, the contractor abandoned work on September 24, 1912," determined that the contract should be annulled, and on March 14, 1913, wrote a letter to the appellant, stating:

> Referring to your letter of February 28, 1913, in which you definitely informed me that you have discontinued work on your contract, * * * I have to inform you that this contract with its supplementary contract * * * is hereby annulled with the sanction of the Chief of Engineers and that arrangements will be made to secure the performance of the uncompleted work in accordance with Paragraph 4 of the contract. (R. 24.)

The appellant never protested as to the character of the material dredged until it requested a cancellation of the contract of November 1, 1912. (R. 24.)

The farther upstream the dredging was done, the transportation of the material dredged became more expensive and the contract less profitable. A considerable part of the 3,500 acres of swamp land was reclaimed by this dredging. The value of such 3,500 acres, after filling, increased $42,000,000. (R. 24–25.)

> After the work was abandoned by plaintiff and the two contracts canceled * * * the uncompleted part of the work was advertised August 16, 1913, on the same specifications, surveys, and borings and was awarded to Eugene Breyman at 26.7 cents per cubic yard, scow measurement, contract dated October 10, 1913, who completed the work. The increase in cost to the Government on the work done under the Breyman contract, over what it would have cost under appellant's contracts, was $141,127.31, being much in excess of the retained percentages. (R. 25.)

Upon these facts found by the Court of Claims, the appellant contends:

1. That it was deceived by the representations made by the Government as to the character of the materials to be dredged.

2. That because of such alleged deception it had a right to refuse to carry out the contract as made and to request a modification thereof.

3. That it did not refuse to complete the contract, but merely requested a tentative suspension of work and a consideration in the meantime of its request for a modification.

4. That in such circumstances the Government had no right to annul the contract and let the work to another contractor.

5. That it is entitled to recover the retained percentages and the Government can not hold the same and apply them to the money the Government lost

because of the differences between the price of the new contract under which the uncompleted work was performed and the contract made by appellant, the appellant contending as a part of this last theory that if the retained percentages are to apply to any losses sustained on the new contract, the Government must show that the new contract, together with the specifications, etc., thereof, were identical with the old contract which was annulled.

The position of the Government is summarized in the argument.

ARGUMENT

SUMMARY

I. There was no misrepresentation by the United States as to the nature of the material to be removed. The United States disclosed to bidders such information as it had, but this disclosure did not amount to a representation, and, besides, the material encountered by the contractor was the same as indicated by the United States.

II. The contractor did not rely on any representation by the United States as to the nature of the material to be dredged. The contract expressly required the contractor to ascertain the conditions for itself, and the contractor from actual experience had more complete knowledge than the United States as to the conditions to be encountered.

III. The voluntary cessation of work by the contractor constituted a breach. The contract did not contemplate a complete cessation of work except during December, January, and February, and required substantial progress in every other calendar month.

IV. The letters written by the contractor amounted to an unequivocal declaration of an intention to finally cease performance, and justified the United States in treating the contract as broken.

V. The contract having been broken by the contractor, the United States was justified in reletting the work and applying the retained percentages to the additional cost incurred in reletting the work. The Findings show that the work relet was the uncompleted part of the work covered by the first contract, and was relet under the same specifications.

Conclusion.

I

There was no misrepresentation by the Government as to the nature of the material to be encountered

The appellant contends that the cessation of work by it was justified and not a breach of its contract, because prior to making the contract the Government misrepresented the character of the material to be removed. The facts bearing upon this point may be briefly summarized as follows:

The Government advertised for bids and referred to specifications which had been prepared. The appellant made a bid after examination of the specifications. The specifications included certain boring sheets which purported to show, and the Government submits did show, the result of actual borings made in a fair manner by competent men. The court below in Finding IV (R. 20) set out in detail the facts concerning such borings, showing that they were made with a steel rod operated by

hand and that "the depth of the water and of each kind of material penetrated was recorded." The court also found that "this was the proper and customary way to make borings where the depths of the water and character of the bottom were such as was found in the channel proposed to be dredged." (R. 20.) The court also in such Finding stated that:

> These borings were made by competent men in good faith and according to their best judgment, and whenever they struck a bowlder the fact was recorded, the boring stopped at that place, and they went on to another place for another boring. (R. 20.)

And as conclusive upon the question which the appellant now raises concerning the alleged misrepresentation by the Government we submit the statement by the court in Finding IV that "the material afterwards dredged from the channel corresponded generally to the material indicated by the borings. These sheets were furnished to prospective bidders." (R. 20.)

We submit that these Findings by the court below, which in accordance with the well-established rules will not be disturbed by this Court, are controlling upon the question of the alleged misrepresentation by the Government. *The court below found that the borings were fairly made by competent men; that they truthfully recorded the result of such borings; and that the material actually encountered corresponded generally to that*

revealed by the borings, all of which information was furnished to prospective bidders (which included the appellant herein) by the Government. Since there was no misrepresentation, the contention of the appellant fails, and such authorities as—

> *Hollerbach* v. *United States,* 233 U. S. 167;
>
> *Christie* v. *United States,* 237 U. S. 234;
>
> *United States* v. *Atlantic Dredging Co.,* 253 U. S. 1;
>
> *United States* v. *Spearin,* 248 U. S. 132; and
>
> *United States* v. *Smith,* 256 U. S. 11;

become inapplicable, as in all such cases this Court found and predicated its opinion upon the existence of a misrepresentation. The case of *MacArthur Bros. Co.* v. *United States,* 258 U. S. 6, is directly applicable.

II

The appellant did not rely on any representations by the United States as to the nature of the material to be encountered

This is so, because (1) the contract required appellant to ascertain these facts for itself; (2) the bid was submitted with full knowledge of the actual existing conditions and the character of the work to be performed, and therefore appellant was not deceived by such alleged misrepresentations. The contract provided that:

> The material to be excavated is believed to be mud, sand, and gravel, but bidders are

> expected to examine the work and decide for themselves as to its character and make their bids accordingly, as the United States will not guarantee the accuracy of this description. (R. 18.)

The appellant in its proposal stated that "the manager of this plant has been engaged in this class of work for many years" (R. 19), and then sets out six specific instances and states "and at least 50 other contracts." Among the instances specifically stated is the "Newark Bay and Passaic River, 1904 to 1906, completed O. K." (R. 19.) It will be recalled that these are the same waters in which the dredging under the contract now in question was to be performed. In its bid the appellant also stated:

> We make this proposal with a full knowledge of the kind, quantity, and quality of the work required. (R. 19.)

The court below found as a fact that—

> The manager above referred to was John A. Seeley, who made the estimates for plaintiff's bid, and who was very familiar with the whole stretch of Newark Bay and Passaic River covered by plaintiff's contract, his experience extending over a period of eleven years, and he had been superintendent of a contract for dredging a twelve-foot channel over the same course. (R. 19.)

The record also shows that appellant must have had some other motive than the compensation to be paid by the Government for this work.

In Finding V (R. 20) it is shown that the Government estimates for the cost of this work were 26 cents per cubic yard for the lower reaches of the river and 32 cents per cubic yard for the upper reaches. The appellant took this work for 16¼ cents per cubic yard for all of such dredging. The other bids ranged from 22.2 cents to 36.4 cents per cubic yard. The motive of appellant becomes apparent by the Findings of the court below, where in Finding VI (R. 21) and Finding X (R. 24, 25) it is revealed that the same financial interests which owned this dredging plant also owned a large area of land located near the place of this proposed dredging, which land was then in process of reclamation by filling; that a large part of the material dredged under this contract was deposited upon this land; and that the reclaimed land, as the result of filling, increased in value to the extent of forty-two million dollars.

The facts relating to the ownership of this land to be reclaimed and the enormous profits made by such reclamation give color to the entire transaction and explain why appellant in this case was willing to enter into a contract to perform this work at a price much below the Government estimates as well as the bids of others. It also colors the contention that appellant was deceived, it appearing from the findings of the Court below that the appellant in this transaction was represented by thoroughly competent men, experienced not only in this line of

work but experienced in the precise area to be dredged under this contract. In these circumstances the provisions of the contract requiring the contractor to ascertain for himself the nature and character of the work to be done should be given full meaning and effect; the statement by the contractor that it did have full knowledge and that such knowledge was acquired in a specific way should be construed to mean what it says; and the contractor, entering into this agreement with his eyes open, fully informed and aware of the things that he should do and the nature of the work that he would be required to perform, and impelled by a motive to gain enormous profits by the reclamation of the land to be filled, should not now be heard to say that the boring sheets misled him to his disadvantage and that he was deceived thereby.

We recognize the general rule, as has been announced in the decided cases in this Court, such as—

Hollerbach v. *United States,* 233 U. S. 167;
Christie v. *United States,* 237 U. S. 234;
United States v. *Atlantic Dredging Co.,* 253 U. S. 1;
United States v. *Spearin,* 248 U. S. 132; and
United States v. *Smith,* 256 U. S. 11;

to the effect that representations by the Government upon a specific matter which proved to be inaccurate and untrue will not be overcome by the general provisions of the specifications of a contract requiring the contractor to ascertain the facts for himself or by the provisions of his bid stating

that he makes it with full knowledge. However, in this case the facts are so strong in support of the contention that the contractor did know of the nature and character of the work to be performed that this case is not within the ruling of this Court in the cases just cited.

III

Complete cessation of work by the appellant was a breach of the contract

The contract in this case, among other things, provided (R. 19) that:

> The required rate of work will be at least 50,000 cubic yards per month, unless otherwise authorized by the engineer. If at any time after the date fixed for the beginning of the work it shall be found that operations are not being carried on as rapidly as required by the contract, the engineer shall have power

to proceed to procure other means of having the work performed. It was also provided that:

> *No work will be required in the months of December, January, and February,* but it may be continued in these months if the contractor so desires. (R. 19.)

Paragraph 14 of the specifications (R. 8) provided that:

> The contractor will be required to commence work under the contract within thirty (30) days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, unless otherwise au-

> thorized by the Engineer, to prosecute the said work with faithfulness and energy, in accordance with paragraph 21.

Paragraph 4 of the contract (R. 4) provided that:

> If, in any event, the party of the second part [the appellant] shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in the judgment of the engineer in charge, *fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements* of this contract (Italics ours),

then the Government would have the right to "annul" the contract and hold all moneys due, including therein retained percentages, and proceed to have the work completed and hold the contractor for the excess cost, if any, of such completion over the price provided for in the contract.

The Government submits that all these provisions taken together require the contractor to excavate at least 50,000 cubic yards during each and every working month, and not, as appellant contends, to excavate an average of 50,000 cubic yards per month. However, if the Government should be wrong in this contention, it is clear that it was intended that some work should be done on this contract during each month after its inception except during the months of December, January, and February. It can hardly be seriously contended

that the entire cessation of work by the appellant during any given month, except those specifically provided for in the contract, was a faithful and diligent prosecution of the work. The contract provides that no work shall be done during the months of December, January, and February. This excludes the idea that during any other months the contractor may fail to do any dredging whatsoever under said contract. If it could fail during any other one month, why could not it also be said that it could fail during any three or four months, or during a month now, another month two or three months later, and so on, until the work would be indefinitely prolonged?

Now, let us see what the facts are upon this question. The engineer officer in charge reported to the Chief of Engineers that *if* the average monthly excavation of 50,000 cubic yards *should be* used as the measure of work required of appellant then the appellant would not be in default until some few months after the date that the contract was " annulled " (R. 24). However, it is definitely shown (Finding VII, R. 21, 22) that:

> After January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24, 1912. During eight months in which work was required no work was done, and in every month except three plaintiff was in default in its monthly dredging work,

> and in June, July, August, and September, 1912, it dredged 31,926 cubic yards instead of the minimum required by the contract, 200,000 cubic yards.

The court below also found (Finding VIII, R. 22) that—

> on September 24, 1912, the plaintiff stopped work on the contract.

The record also shows that appellant never again did any more work upon such contract. (Finding IX, R. 22, 23, and 24.) It is thus conclusively shown that during eight of the months prior to September 24, 1912, when work was required to be done under the contract the appellant did no work whatever thereon; that from September 24, 1912, until the "annulment" of the contract by the Government on March 14, 1913, appellant did not work upon said contract. During such time subsequent to September 24, 1912, the appellant was required by the contract to perform work in the months of October and November and a part of the month of March. We, therefore, respectfully submit that, irrespective of appellant's unequivocal refusal to continue and perform such contract, which will be discussed in the next succeeding paragraph, appellant was in default under the terms of said contract because of its failure to perform work thereon, and as provided in said contract the Government then had the right to "annul" the same and to pursue the remedies provided for by said contract and by the rules of law applicable thereto.

IV

Appellant unequivocally refused to continue performance and thereby committed a breach of the contract

The appellant contends that it did not refuse to perform this contract, but that it merely temporarily suspended proceeding upon the performance thereof pending the determination of its request for modification of such contract. The Government submits that the Findings show, in addition to a default in the performance of the work under the contract, as set out in the next preceding paragraph, that the appellant herein unequivocally refused to proceed further with the contract and thereby committed a breach giving the Government the right to "annul" the contract.

The facts are that after appellant started with great energy and success in the performance of this contract its efforts were diminished until, as said in Finding VII:

> After January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24, 1912. During eight months in which work was required no work was done, and in every month except three plaintiff was in default in its monthly dredging work. (R. 21, 22.)

The appellant finally entirely stopped work upon the contract on September 24, 1912 (Finding VIII, R. 22), and although appellant was supposed to be continuing work under the contract it did not do

so. On November 1, 1912, the plaintiff wrote to the Secretary of War requesting the cancellation of the two contracts, and claiming the right to be relieved of further performance. (This Brief, pp. 9–10; R. 22, 23.)

To this the Engineer's Office replied on February 8, 1913, stating that appellant should—

> resume dredging at the earliest possible date, and not later than March 1, 1913, *and prosecute the work with faithfulness and energy in accordance with the contract. The entire cessation of the work is not contemplated under the contract,* although you have attained the required average rate of progress to date upon same. (R. 23.) (Italics ours.)

And on February 21, 1913, the Engineer wrote the appellant requesting a reply. (R. 23.) On February 28, 1913, the appellant replied and stated:

> We respectfully refer you to our previous correspondence on this subject, *wherein we have informed you of our intention to discontinue work on this contract for reason therein specified. Under advice of our attorneys, we have not changed* our position in the matter. (R. 23.) (Italics ours.)

This letter was referred to the Chief of Engineers, with request for advice "as to the propriety of annulling this contract at this time." (R. 24.) The Chief of Engineers replied:

> *Since the contractor has definitely abandoned the contract,* as evidenced by letter of the 28th ultimo, the contract should be at

> once annulled by giving notice to that effect to the contractor and the sureties, preserving evidence of the receipt of such notices (italics ours);

and that

> after annulment of the contract recommendation as to the method of completing the work, or other course to be followed, should be submitted. (R. 24.)

The engineer in charge then, under date of March 14, 1913, wrote appellant, stating:

> Referring to your letter of February 28, 1913, in which you have *definitely informed me that you have discontinued work on your contract* * * * I have to inform you that this contract * * * is hereby annulled, with the sanction of the Chief of Engineers, and that arrangements will be made to secure the performance of the uncompleted work in accordance with paragraph 4 of the contract. (R. 24.) (Italics ours.)

If appellant had not unequivocally abandoned the work, it most assuredly would have replied to this letter for the purpose of informing the Chief of Engineers that he had misapprehended appellant's advice of February 28, 1913.

Viewed in the light of the then existing conditions, as to the actual cessation of work on this contract by appellant, the letter dated November 1, 1912, must be construed as an unequivocal refusal to complete the work. This contention is

strengthened by the construction given to such letter by appellant in its later letter dated February 28, 1913.

The court found that appellant " requested the cancellation " of the contract.

The appellant in its letter stated that it submitted certain facts " in support of our position that the contract should be terminated," and in paragraph 3 of its letter it stated that " the contract should be discontinued and terminated." This shows that appellant intended that its previous letter should be considered as an absolute refusal to complete the contract and was a reiteration of such refusal. Nothing was then left to the Government but to consider what its rights were under the contract, and the Government then proceeded, after consideration not only by the engineer in charge but also by the Chief of Engineers, to declare the contract " annulled," as provided by paragraph 4 of the contract. We submit that this action upon the part of the appellant fills all the requirements as laid down in the decided cases, such as *Smoot's Case,* 15 Wall. 36, where, at page 48, this Court says:

> A mere assertion that the party will be unable to perform his contract is not sufficient. It must be a distinct and unequivocal refusal to perform the promise *and must be treated and acted upon as such by the party to whom the promise was made.* (Italics ours.)

To the same effect, see *Dingley* v. *Oler,* 117 U. S. 490, at page 503.

We have shown that the facts in this case meet the stringent requirements of the rule applicable to a purely anticipatory breach. However, it has been above shown that appellant both defaulted and refused to further perform the contract at a time when performance by appellant was due under said contract.

V

The contract having been "annulled," as provided therein, the Government was within its rights in applying the retained percentages to the cost of completing the work in excess of the contract price with appellant. The work relet was the work which appellant had agreed to perform

The appellant being in default in the performance of the contract, as hereinbefore shown, and having definitely and unequivocally refused to complete the performance thereof, the Government determined that the same should be "annulled," (R. 24) and gave notice to appellant to that effect, with the advice that—

> arrangements will be made to secure the performance of the uncompleted work in accordance with paragraph 4 of the contract. (R. 24.)

Paragraph 4 of the contract (R. 4) provided as follows:

> 4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the perform-

ance of the work on the day specified herein, or *shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract,* then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, *and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money and reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part* until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the United States during the period herein allowed for the completion of the contract by the party of the second part; *and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved per-*

> *centage as aforesaid;* and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law. (Italics ours.)

The Government on August 16, 1913, advertised the uncompleted part of the work "on the same specifications, surveys, and borings," and awarded a contract therefor to Eugene Breymann—

> at 26⅞ cents per cubic yard, scow measurement, contract dated October 10, 1913, who completed the work. The amount of material dredged by him was 1,328,257 cubic yards. (Finding XI, R. 25.)

The court below also found that the cost to the Government of the work done by Breymann under his contract was $356,969.07, which was $141,127.31 more than it would have cost the Government had appellant done the work in accordance with his contract, and that this sum was $107,129.16 more than the retained percentages sued for, which amounted to only $33,998.15.

Every step taken by the Government was precisely in accordance with the contract with appellant. Of course, the word "annulled," as it is used in the contract, is, as this Court has said, "ill-chosen." The Court, in the case of *United States* v. *O'Brien,* 220 U. S. 321, at page 328, said:

> The ill-chosen word "annulled" in the contract, repeated in the notice to the contractors and in the complaint, can not be

> taken literally in any of them. It means refuse to perform further, not rescind or avoid. *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard,* 13 How. 307, 340. For if the contract were made naught by the Government's election and notice, all rights under it would be at an end, whereas it provides in terms that rights shall rise upon annulment, which but for this provision in the contract the Government would not have.

However, the appellant contends that it does not appear that the uncompleted part of the work covered by the contractor's contracts had been completed under a new contract and specifications like the old. The rule upon this question was stated by this Court in the case of *United States* v. *McMullen,* 222 U. S. 460, where this Court, at pages 471 and 472, said:

> The objection that the second contractor does not appear to have completed the work intended to be accomplished by the first, that is to have made a channel of a certain depth, does not impress us. The first contract was for certain work for a certain object, but limited and subject to change as the appropriations might require. The second was for the same on the same plans and specifications, the only difference being in the parties, the price, and the liberty given to the second contractor to dump in deep water, which diminished the cost. In the first contract the Government reserved an absolute right of choice in this regard. Whether the object of

> the contract was attained is immaterial, *so long as the work done towards it was work that the first contractor had agreed to perform.* (Italics ours.)

The above decision is discussed and approved in *United States* v. *Axman,* 234 U. S. 37.

The Court of Claims found (R. 25) that "*the uncompleted part of the work*" covered by the two old contracts was relet. This shows that the *work* done under the new contract was that called for by the old. It also found that the work was relet "on the same specifications." If the work to be done and the specifications as to the details of performance were the same, it is established that the additional cost incurred was for work which the original contractor had agreed to do. Finding XI (R. 25) punctures the claim that there was any variation between the old and the new contracts in respect to the work required to be done and the manner of performing it.

The change in the parties, the price, and other details is not material, as the work which Breymann did was all work which appellant was required under its contract to perform.

CONCLUSION

It is therefore respectfully submitted that the appellant defaulted in the execution of its contract; that by notice it unequivocally refused to complete the contract; that in accordance with the provisions of the contract the Government determined to pro-

ceed no further with the same and to avail itself of the right provided by the contract in such contingencies; that the Government, strictly in accordance with the terms of the contract, after proper advertisement and notice, relet to another contractor the work which appellant should have performed, and applied the retained percentages to the difference between what the work cost the Government under the new contract and what it would have cost the Government had the appellant performed the same as it had agreed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.

NOVEMBER, 1925.

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SUPREME COURT OF THE UNITED STATES.

No. 105.—October Term, 1925.

Midland Land & Improvement Company, Appellant, *vs.* The United States.	Appeal from the Court of Claims.

[March 1, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

On August 12, 1907, the Midland Land & Improvement Company agreed with the United States to dredge and dispose of 4,177,110 cubic yards of material in Newark Bay and Passaic River at 16¼ cents per yard, payable as the work progressed. The contract provided that the work should be prosecuted with "faithfulness and energy" and that the rate of work "will be at least 50,000 cubic yards per month." On September 24, 1912, the company stopped work, leaving much unperformed. In 1913, the Government declared the contract "annulled", and had the uncompleted part of the work done by another contractor, who was paid 26 7/10 cents per yard. See *United States* v. *O'Brien,* 220 U. S. 321, 328. The additional cost to the Government was $141,127.31. The Midland contract provided that the Government would reserve from each payment ten per cent. until half the work was completed, and that the amount reserved might be applied toward reimbursing it for any additional cost resulting from the contractor's default. The sum of $33,998.15, which had been reserved, was so applied. In 1917, the company brought this suit in the Court of Claims to recover the amount. Upon elaborate findings of fact that court entered judgment for the United States. 58 Ct. Cls. 671. The case is here on appeal, taken May 15, 1924, under § 242 of the Judicial Code.

It is contended that at the time when the Government annulled the contract the amount of work done had exceeded the aggregate of the monthly requirements, and, hence, that the company was

not in default. This question we have no occasion to consider. The correspondence between the parties and other facts found warranted the conclusion that the company had abandoned the work and refused to complete the contract. There was thus an anticipatory breach by the company which entitled the Government to relet the uncompleted part of the work. Compare *Smoot's Case,* 15 Wall. 36, 48; *Dingley* v. *Oler,* 117 U. S. 490, 503. It is also contended that the judgment is erroneous, because it was incumbent upon the Government to show that the uncompleted work done under the later contract did not materially depart from that described in the repudiated contract and that this was not shown. See *United States* v. *Axman,* 234 U. S. 36. The lower court concluded that the uncompleted part of the work was relet on the same specifications. Enough appears to show that the loss to the Government resulting from the plaintiff's repudiation of the contract far exceeded the amount reserved.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.